134-240

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1498.

THE CITY OF CHESTER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 31, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 31, 1889.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Pennsylvania, appellant, and The City of Chester, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of
2 a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellee, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the — Monday of —— next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eleventh day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed Feb'y 11, 1889:

JOSEPH P. BRADLEY,
Associate Justice of Supreme Court U. S.

[Endorsed:] Filed in supreme court, middle district, Feb. 13 1889.

3 The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The City of Chester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this 11th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JOSEPH P. BRADLEY.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

I, James W. M. Newlin, being duly sworn according to law, depose and say that I mailed this citation and a copy thereof to Hon. W. S. Kirkpatrick, attorney general of Pennsylvania, on February 12, 1889; that he received the same the next day, and that subsequently I served the same upon him by showing him the original and handing him a copy thereof.

JAMES W. M. NEWLIN.

Sworn and subscribed before me this seventh day of March, 1889.

[Seal H. Homer Dalbey, Notary Public, Philadelphia.]

H. HOMER DALBEY,
Notary Public.

[Endorsed:] Att'y gen'l. City of Chester *vs.* Commonwealth of Pennsylvania. Error to supreme court of Pennsylvania. Citation.

4 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereto annexed, as follows, to wit:

Appearance Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to 191, March term, 1887, is contained the following copy of appearance docket entries:

COMMONWEALTH OF PENNSYLVANIA *vs.* CITY OF CHESTER } Appeal from the Settlement of the Auditor General and State Treasurer.

[On margin:] Kirkpatrick. Newlin. 191.

Feb. 14, 1887.—Appeal and specification of objections filed.
Feb. 19, 1887.—Approved bond filed.
March 30, 1887.—*Narr.* and copy of account filed.
April 20, 1887.—Agreement to try without jury filed.
April 22, 1887.—Affidavit of treasurer filed.
May 12, 1887.—Affidavit of market value filed.
Dec. 19, 1887.—Special term J. L.
April 30, 1888.—Stenographer's notes filed.
April 30, 1888.—Opinion and findings of the court filed, deciding in favor of the defendant. Counsel notified.
May 18, 1888.—Exceptions overruled and judgment entered in accordance with opinion filed.
May 21, 1888.—Writ of error filed.

5 Certified.

WILLIAM H. ULRICH,
Prothonotary.

[Seal of the Court of Common Pleas of Dauphin County.]

Bond on Appeal. Filed Feb. 19, 1887.

Know all men by these presents that the City of Chester and Henry Hinkson, treasurer of the city of Chester; Thomas I. Leiper. and M. H. Hinkley, of the same place, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of twenty-five hundred dollars, lawful money of the United States, to be paid unto the Commonwealth; to which payment, well and truly to be made, we, the said obligors, hereby bind ourselves, our successors, heirs, executors, administrators, by these presents. Sealed with our seals and dated this seventeenth day of February, 1887.

Whereas the said City of Chester has appealed to the court of common pleas of Dauphin county from the settlement of the account made against it by the auditor general and State treasurer December 18, 1886, for taxes on loans of the City of Chester, and charging said appellant with the sum of $1,167.30 for taxes, alleged to be due to the Commonwealth of Pennsylvania upon certain bonded indebtedness of said city for the year 1886:

Now, the condition of this obligation is such that if the said appellant shall prosecute with effect said appeal and shall pay
6 to the Commonwealth of Pennsylvania whatever may be adjudged due to the Commonwealth of Pennsylvania in said case, then this obligation to be void; otherwise to be and remain in full force and virtue.

THE CITY OF CHESTER,
By J. L. TENWOOD, *Mayor.*
HENRY HINKSON, *Treasurer.*
THOS. I. LEIPER.
M. H. HINKLEY.

Sealed and delivered in the presence of us—
REECE L. THOMAS,
As to T. J. L. & M. H. B.
F. A. PALMER,
As to T. J. L. & M. H. B.

And now, Feb. 17, 1887, the above bond is approved and the sureties certified to be sufficient.

THOMAS J. CLAYTON,
Judge of the Court of Common Pleas of Delaware County.

The security of the within bond approved.
By the court:

J. W. SIMONTON, *P. J.*

7 *Appeal of the City of Chester. Filed Feb. 14th,* 1887.

The appeal and specifications were as follows:

In the matter of the account settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania December, 1886, against the city of Chester for tax on loans per act of June 30, 1885, on $406,500 of loans, for the year ending first Monday of March, 1886, at three mills---------- $1,219 50
Less treasurer's commission---------- 52 20

The said city of Chester hereby appeals from the said settlement of account to the court of common pleas of Dauphin county, and assigns the following specifications of objection thereto:

I. The tax claimed in said settlement is void for want of an assessment and because it is contrary to article IX, section 1, of the constitution of Pennsylvania, which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same, because no assessment of the said bonds is provided by law and no notice or opportunity is given to the bondholders to be heard either before or after the tax is paid concerning its validity.

II. The report made by the treasurer of the city of Chester, upon which the settlement appealed from of December 18, 1886, purports to have been made, was made under protest in the words and figures following, to wit:

E—Form 1.

Report and Assessment of the Bonded Debt of the City of Chester for the Year Ending First Monday of November, 1886, *with Rate of Interest and Date of Payments of the same during the Period aforesaid.*

8

Description of debt.	Amount.	Assessment at nominal value.	Rate of interest.	Date of payment of interest.
Registered bonds ----------	$55,500 00	$55,500 00	6	Jan. & July.
	231,000 00	231,000 00	5	Jan. & July.
	120,000 00	120,000 00	4	Jan. & July.
	$406,500 00			

NOTE.—The above figures are inserted in compliance with the requirement of the auditor general. They do not represent the real value of the bonds and no portion of the endorsed protest is hereby waived.

"I, —— ——, treasurer of the city of Chester, have made this report on the bonded indebtedness of the city of Chester, and have filled up the blanks herein at the request of the auditor general of the State of Pennsylvania and by advice of counsel. I hereby protest against being required to make this return, and I further protest that I have no power to make any assessment of said bonds, and I further state that I have made no assessment and have not been authorized by law to make one. I further protest that the tax sought to be levied upon the bonds issued by the city of Chester through me by means of this report and on settlement to be made by the auditor general and State treasurer thereon against me for said tax is void under the Constitution of the United States and of the State of Pennsylvania for want of a valid assessment and for inequality.

"(Signed) ——— ———,
"*Treasurer of the City of Chester.*"

The city of Chester claims that this return does not constitute a valid assessment of the bonds therein set forth, and that the same furnishes no legal basis for the collection of a tax upon said loans by requiring appellant to withhold said tax from the interest payable to the resident holders thereof, as claimed in the settlement of account herein appealed from.

III. Neither the act of June 30, 1885, nor any other act authorizes the auditor general and State treasurer to settle an account against the appellant, The City of Chester, for said tax on loans in the said settlement of account of June 9, 1885.

9 IV. If any tax on said loans of the city of Chester can lawfully be charged by the Commonwealth to the appellant under any act of Assembly the amount of said tax cannot exceed the rate fixed by the act of June 30, 1885, to wit, at the rate of three mills on every dollar of the interest paid on said bonds.

V. The interest on said loans of the city of Chester varies from four to six per centum and the same mature at different times. By reason of the difference in the rate of interest and the time of maturity of said loans the market value thereof varies.

VI. The Commonwealth claims that all of the loans of the city of Chester held by residents of the State are taxable to said resident bondholders at the nominal or face value of said bonds, without regard to the variations in the real value of the respective series of bonds arising from difference in the rates of interest payable thereon and the time of maturity thereof.

VII. Appellant further says that the act of June 30, 1885, and any other act, in so far as they require appellant to retain from the interest payable to resident holders of bonds of the city of Chester the aforesaid State tax on the nominal value thereof, are void, because the said legislation and attempted taxation are repugnant to article XIV, section 1, of the Constitution of the United States, which provides:

"* * * Nor shall any State deprive any person of life, liberty,

or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant further says that the said requirement is a taking of the property of said bondholders without "due process of law" and denies to said bondholders "the equal protection of the laws;" that said acts of Assembly were forthwith avoided and made null and void by the adoption of the said fourteenth amendment to the Constitution of the United States and by virtue of article V of said Constitution of th United States:

(*a.*) Because the Legislature of Pennsylvania cannot lawfully enact that the bonds aforesaid shall be taxed to the resident holders at their nominal value.

(*b.*) Because the ascertainment of the value of taxable property is an executive and not a legislative function.

(*c.*) Because by the law of the land all taxes on property must be by a valuation thereof.

(*d.*) Because the valuation must be uniform. Other personal property is taxed at its real value on notice to the owner.

(*e.*) Because the valuation must be by duly qualified assessors under the sanction of the law.

(*f.*) Because no provision of law is made for officers to estimate and appraise the value of said bonds.

(*g.*) Because no assessment thereof whatever is provided for.

(*h.*) Because the bondholders are given no notice and no time and no opportunity either before or after the payment of the tax to be heard respecting its validity or correctness.

(*i.*) Because the statutory provisions aforesaid are framed so that bondholders cannot thereunder be made parties or intervene in any way concerning the said tax either before or after the collection thereof.

(*j.*) Because the State of Pennsylvania has provided no means whereby the bondholders may make payment under protest and then sue the State to recover said illegal tax.

J. L. FORWOOD, *Mayor.*
HENRY HINKSON,
City Treasurer.

Narr. Filed March 30th, 1887.

In Dauphin Common Pleas. No. 191. March Term, 1887.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of city of Chester of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the eighth day of December, A. D. 1886, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of one thousand one hundred sixty-seven $\frac{30}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed

by the auditor general of this Commonwealth and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per centum per annum, from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth for tax on loans, per act of June 30th, A. D. 1885, for year ending first Monday of November, A. D. 1886, which said account was, on the 13th day of December, A. D. 1886, submitted to, revised and approved by the State treasurer, and a copy thereof thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and — appealed from; whereby and by force of the statute in such made and provided an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges; and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff on request the said last-mentioned sum of money;

And whereas also the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the use
12 of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth against the said defendants, on the day and year in the first count mentioned, for tax on loans as aforesaid, and approved by the State treasurer on the day and year in the first count mentioned;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request; yet the said defendants have disregarded their said promises, and although often requested so to do have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JNO. F. SANDERSON,
Deputy Attorney General.

13 *Copy of Accounts.*

Chester City, Delaware county, in account with the Commonwealth of Pennsylvania.

For tax on loans, per act of June 30, 1885, for year ending first Monday of November, 1886, as per report herewith filed.			
Loans, $406,500; tax, 3 mills		$1,219 50	
Deduct 5 per cent., treasurer's commission—			
On $1,000.50	$50 00		
On $219.50	2 20		
		52 20	
			$1,167 30
Due Commonwealth			$1,167 30

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *December* 8, 1886.

Settled and entered:

JEROME B. NILES,
Auditor General.

TREASURY DEPARTMENT,
HARRISBURG, *December* 13, 1886.

Approved:

W. LIVSEY,
For M. S. QUAY,
State Treasurer.

14 *Agreement to Trial Without Jury. Filed April* 20, 1887.

In the Court of Common Pleas of Dauphin County. March Term, 1887.

COMMONWEALTH OF PENNSYLVANIA
vs.
CITY OF CHESTER. } No. 191.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court, to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

W. S. KIRKPATRICK,
Attorney General.
JAMES W. M. NEWLIN,
For City of Chester.

15 *Affidavit of Market Value. Filed May* 12, 1887.

In the Court of Common Pleas of Dauphin Co.

COMMONWEALTH OF PENNSYLVANIA
vs.
CITY OF CHESTER. } No. 191. March Term, 1887.

COUNTY OF DELAWARE, *City of Chester*, } *ss:*

Henry Hinkson, being duly affirmed according to law, deposes and says that he is the treasurer of the city of Chester and that for the year ending the first Monday of November, 1886, the six per cent. bonds of the city of Chester have been worth in the market at least fifteen per centum more than the four per cent. bonds of the said city of Chester.

HENRY HINKSON,
City Treasurer.

Affirmed and subscribed before me this seventh day of May, A. D. 1887.

[Seal of Orlando Harvey.]

ORLANDO HARVEY,
Notary Public.

16 (*Agreement as to Affidavit.*)

And now, May 12, 1887, it is agreed that the within affidavit may be considered as if offered in evidence in due time, subject to no objection by the Commonwealth as to its competency, but subject to objection that the facts alleged are irrelevant and immaterial.

W. S. KIRKPATRICK,
Attorney General.

17 *Stenographer's Notes. Filed April 30th*, 1887.

Dauphin County, Pa., Court of Common Pleas. March Term, 1887.

COMMONWEALTH
vs.
CITY OF CHESTER. } 191.

Tried before Hon. John W. Simonton, president judge, and Hon. John B. McPherson, additional law judge, without a jury, at Harrisburg, April 20, 1887.

Appearances: Commonwealth, Attorney General Kirkpatrick, Deputy Attorney General Sanderson; defendant, Hon. J. W. M. Newlin.

Reported and transcribed in compliance with the act of Assembly, approved May 8, A. D. 1876.

H. C. DEMMING,
Court Stenographer.

HARRISBURG, PA., *April 20th*, 1887.

It is agreed that whatever opinion is filed in the one case shall be applied to the other two.

ROBERT S. FRAZER, called by the Commonwealth, sworn with uplifted hand.

Direct examination by Attorney General KIRKPATRICK:

Q. You are the corporation clerk in the auditor general's office?
A. Yes, sir.
—. And have you been how long?
A. Six years.
Q. It is your duty as corporation clerk to act for the auditor general in making settlements with corporations?
A. Yes, sir.
Q. Under the corporation tax law?
A. Yes, sir.

18 Q. (Hands to witness a settlement with Chester city, Delaware county, tax on loans for the year 1884, in the suit No. 397, August term, 1885.) State what that is.
A. This is a report of the city of Chester of its bonded debt.
Q. What is the settlement?
A. It is a settlement against the city of Chester for the tax on loans for the year 1884, amounting to $1,690.80, less treasurer's commissions—$56.90—leaving the amount due the Commonwealth $1,633.90; settled by the auditor general June 6th, 1885, and approved by the State treasurer June 9th, 1885.

(Paper marked Exhibit XI, H. C. D., offered in evidence in case No. 297, August term, 1885.)

Q. (Witness handed certificate of tax on loans, settlement with Chester city, Delaware county, for the year 1885.) State what that is.
A. Settlement against the city of Chester for tax on loans for the year ending first Monday in November, 1885, amounting to net amount due, $1,415.97; settled by the auditor general March 9, 1886, and approved by the State treasurer March 9, 1886.

Offered in evidence in suit No. 419, April term, 1886 (marked Exhibit XII, H. C. D.).

Q. (Witness handed settlement and certificate of tax on loans, Chester city, Delaware county, for year 1886.) State what that is.
A. This is the settlement against the city of Chester for the tax on loans for the year ending first Monday of November, 1886, $406,500. Tax at 3 mills, $1,219.50. Deducting treasurer's

19 commissions, 5 per cent. and 1 per cent., $52.50, leaves a balance due Commonwealth of $1,167.30. Settled by the auditor general Dec. 8, 1886; approved by the State treasurer Dec. 13, 1886.

This paper, offered in evidence in case No. 191, March term, 1887, marked Exhibit XIII, H. C. D.

Q. Those are the originals produced by you from the auditor general's office?

A. Yes, sir.

Q. (Reports and assessments of the city of Chester for the years 1884, 1885, and 1886 of city indebtedness, as returned by the treasurer, for those several years, from those reports that were made by the city treasurer to the auditor general's department upon which these settlements were based.)

A. That is the report for 1884 and that is for 1886 (indicating in each instance).

Q. They are the originals on file in your office?

A. Yes, sir.

Q. And produced by you now?

A. Yes, sir.

Offered in evidence in connection with the settlements and marked X 4, X 5, and X 6.

Commonwealth rests.

Defendant's counsel offer in evidence specifications of appeal, 397, August term, 1885; 191, August term, 1887, and 419, April term, 1886.

Defendant's counsel also offers in evidence the affidavit of the treasurer that he has not retained any part of this tax in paying the interest to the bondholders; that the interest was paid in full and no tax retained.

20 Commonwealth's counsel admits the fact recited in the affidavit, but denies the relevancy.

Defendant's counsel also offers in evidence affidavit by the treasurer stating what is the percentage and difference in selling prices of the 4's and 6's; that there is about 15 per cent. difference.

Objected to the competency and relevancy of the offer.

Argument.

21 *Stenographer's Notes. Filed April* 30, 1888.

Dauphin County, Pa., Court of Common Pleas. March Term, 1887.

COMMONWEALTH *versus* CITY OF CHESTER. } No. 191.

Tried before Hon. John W. Simonton, president judge, and Hon. John B. McPherson, additional law judge, without a jury, at Harrisburg, p. m., Tuesday, December 20, 1887.

Appearances: Commonwealth, Attorney General Kirkpatrick, Deputy Attorney General Sanderson; defendant, Hon. J. W. M. Newlin.

Reported and transcribed in compliance with the act of Assembly, approved May 24, A. D. 1876.

HENRY C. DEMMING,
Court Stenographer.

22 HARRISBURG, PA., P. M., TUESDAY, *December* 20, 1887.

Mr. Newlin having stated the case for the defence—

THOMAS MCCAMANT, called by defence, sworn.

Direct examination by Mr. NEWLIN:

Q. You are the chief clerk in the auditor general's office?
A. I am.
Q. And have been since 1881?
A. Yes, sir.
Q. You are familiar with the custom of the office in the making of settlements for loan tax?
A. I am.
Q. The settlements against counties, or rather to collect the tax on county loans—those settlements are all made against the treasurers of the counties?
A. They have been for a number of years back.
Q. I am only speaking of the custom.
A. Yes, sir.
Q. Then, in regard to the settlement on loans issued by municipalities other than of the city of Philadelphia, I understand the custom to have been to settle the account against the municipality and not against the treasurer?
A. Yes, sir.
Q. And that is the course pursued in this particular case of Chester?
A. I suppose so; I did not take particular notice; but I suppose so, that being the custom.

23 Q. The custom being in the counties to settle the accounts against the treasurer by name, and in the case of municipalities other than the city of Philadelphia to settle against the municipality, I want to know why, if you know, that has been done?
A. A city or borough gives no bond to the Commonwealth. A county treasurer gives a bond to the Commonwealth conditioned for the collection of State revenues, and I think that, perhaps, is the main reason. Of course there are some penalties attached for failure to make a return, and the county treasurer is allowed a commission on the collection of State revenues.
Q. In the case of the city of Philadelphia the settlements are made against the treasurer by name?
A. Yes, sir; they are—that is, the city and county of Philadelphia. It is not made against the city seperately, but the city and county of Philadelphia.
Q. But, in point of fact, no settlement for tax on loans is ever made against the city or county of Philadelphia except through the treasurer?
A. That has been the custom, sir, I think, in the past.

24 Q. And do you know of any statutory authority for settling an account for tax loans against the municipality as such?

(Objection.)

A. I never have examined anything to find any statutory authority, but I know it has been the custom.

Cross-examination by Deputy Attorney General SANDERSON:

Q. How long have you been in the auditor general's office as chief clerk?

A. Since the third day of May, 1881.

Q. Was your attention called to it in respect to this since 1881?

A. Yes.

Q. What has it been up to 1884?

A. So far as I have examined, it has been uniform.

It is agreed that this case stands upon the stenographer's record taken April 20, 1887, so far as it goes and the evidence offered therewith.

(Argument.)

25 *Stenographer's Notes. Filed April* 30, 1887.

Dauphin County, Pa., Court of Common Pleas.

COMMONWEALTH
vs.
CITY OF CHESTER.

397, Aug. term, 1885.
419, April " 1886.
74, Aug. " 1886.

Tried before Hon. John W. Simonton, president judge, and Hon. John B. McPherson, additional law judge, without a jury, at Harrisburg, Tuesday, Dec. 20, 1887.

Appearances: Commonwealth, Attorney General Kirkpatrick, Deputy Attorney General Sanderson; defendant, Hon. J. W. M. Newlin.

Reported and transcribed in compliance with the act of Assembly, approved May 8, 1876.

H. C. DEMING,
Court Stenographer.

HARRISBURG, PA., TUESDAY, *December* 20, 1887—p. m.

Commonwealth's counsel state that it is agreed that the reports, accounts, and settlements be considered in evidence on part of the Commonwealth in cases of Commonwealth *vs.* City of Chester, 397, August term, 1885; 419, April term, 1886, and 74, August term, 1886, in connection with the same evidence that is already in in No. 191, March term, 1887 (Commonwealth *vs.* City of Chester).

It is agreed that the same disposition made of 191, March term, 1887, shall apply to 397, August term, 1885; 419, April term, 1886, and 74, August term, 1886.

26 (*Affidavit of City Treasurer—Market Value.*)

In the Court of Common Pleas of Dauphin County.

Henry Hinkson, treasurer of the city of Chester, being duly affirmed according to law, says that the difference in market value

of the bonds of the city of Chester, bearing, respectively, interest at the rate of six per cent. and four per cent. per annum, is three per cent. in favor of the six per cent. bonds.

HENRY HINKSON,
City Treasurer.

Affirmed and subscribed this 20 day of April, A. D. 1887, before me—

ORLANDO HARVEY,
Notary Public.

[Seal of Orlando Harvey.]

27 *Defendant's Findings of Law.*

Dauphin Common Pleas. March Term, 1887.

COMMONWEALTH OF PENNSYLVANIA
vs.
CITY OF CHESTER. } No. 191.

The defendant respectfully asks the court to find as matter of law as follows:

First. That the return made by the appellant's treasurer is not a lawful assessment of the bonds therein mentioned to the holders thereof, residents in Pennsylvania.

Second. That the settlement of account appealed from herein is not an assessment of the appellant's bonds held by residents of Pennsylvania, and the Commonwealth's claim in this suit cannot be sustained thereby.

Third. That the settlement appealed from is erroneously made, and there is no authority to charge the city of Chester, as a municipal corporation, with the tax claimed. The settlement should have been made against the treasurer of the city of Chester.

Fourth. That the act of Assembly of June 30, 1885, in so far as it requires the retention from the interest payable to resident holders of the appellant's bonds of a State tax of three mills on the nominal value thereof, is void, because the same is repugnant to article XIV, section 1, of the Constitution of the United States, which provided: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its
28 jurisdiction the equal protection of the law."

Fifth. That the requirement that a portion of the said resident bondholder's interest shall be retained to pay said tax is a taking of the property of said bondholders without "due process of law" and denies to said bondholders "equal protection of the law," and that all acts of Assembly requiring said retention were forthwith avoided and made null and void by virtue of the said fourteenth amendment to the Constitution of the United States:

(1.) Because the Legislature of Pennsylvania cannot lawfully enact that the bonds aforesaid shall be taxed to the resident holders at their nominal value.

(2.) Because the ascertainment of value of taxable property is an executive and not a legislative function.

(3.) Because by the law of the land taxes on property must be upon a valuation thereof.

(4.) Because the valuation must be uniform. Other personal property is taxed at its real value on notice to the owner.

(5.) Because the valuation must be made by duly qualified persons acting as assessors under the sanction of the law.

(6.) Because no provision of law is made for officers to estimate and appraise the value of said bonds.

(7.) Because no lawful assessment thereof is provided for.

(8.) Because the tax is a property tax and can only be collected on lawful valuation and assessment, and none has been made,
29 and the bondholders are given no notice and no time and no opportunity, either before or after the payment of the tax, to be heard respecting the validity or correctness thereof.

(9.) Because the statutory provisions under which the tax aforesaid is claimed are framed so that the bondholders cannot be made parties or intervene in any way concerning the said tax either before or after the collection thereof.

(10.) Because the State of Pennsylvania has provided no means whereby the bondholders may make payment under protest, and then sue the State to recover said illegal tax.

(11.) Because the rate of interest on the bonds being different, their interest value is different—and the taxation of all at their face market value makes an unequal taxation between the different issues of appellant's bonds in their relation to each other, as well as in their relation to other personal property, which is taxed at its real value.

Sixth. That the tax provided by the act of June 30, 1885, is three mills, to be computed on the interest paid on the bonds and not upon the principal.

(Defendant's findings of law.)

30 *Findings and Opinion of the Court Below. Filed April* 30, 1888.

Dauphin County Common Pleas. March Term, 1887.

COMMONWEALTH
v.
THE CITY OF CHESTER. } No. 191.

Appeal from settlement of account for tax on loans.

By the COURT: This case was tried without a jury by agreement of parties, as provided by the act of April 22, 1874.

It originated in an account settled December 13, 1886, by the auditor general and State treasurer against the defendant for "tax on loans, per act of June 30, 1885, for year ending first Monday of November, 1886," from which settlement defendant entered an appeal to this court, as authorized by the act of 1811, relative to public accounts.

We find the facts to be as follows:

1. Defendant is an incorporated city in Pennsylvania. It has a

valid indebtedness of $406,500.00, evidenced by registered
31 bonds. Of these bonds to the nominal amount of $55,500.00 bear interest at the rate of six per centum per annum, $231,000.00 at the rate of five per centum, and $120,000.00 at the rate of four per centum.

2. The actual market value of the bonds bearing interest at the rate of six per centum per annum was during the year included in the settlement sixteen per centum more than the actual value of those bearing interest at four per centum and three per centum more than those bearing interest at five per centum.

3. The report of the bonded indebtedness of the city, defendant, made by its treasurer contained the following: "I, Henry Hinckson, treasurer of the city of Chester, have made this report on the bonded indebtedness of the city of Chester, and have filled up the blanks herein at the request of the auditor general of the State of Pennsylvania, and by advice of counsel I hereby protest against being required to make this return; and I further protest that I have no power to make any assessment of the said bonds for taxation, and I further state that I have made no assessment thereof and have not been authorized by law so to do. I further protest that the tax sought to be levied upon the bonds issued by the city of Chester through me by means of this report and a settlement made by the auditor general and State treasurer thereon against me for said tax is void under the Constitution of the United States and of the State of Pennsylvania for want of valid assessment and for inequality;" and we find as a fact that he made no assessment.

The settlement in this case is stated therein to be made under the act of June 30, 1885. That act makes "all mortgages, money owing by solvent debtors, whether by * * bond or judgment, * * all public loans or stocks whatever, * * * and all other monied capital in the hands of individual citizens of the State, * * taxable for State purposes at the rate of three mills on the dollar of the value thereof annually." This language is undoubtedly comprehensive enough to include municipal bonds; but there is nothing to be found in this act which authorizes the tax to be imposed in the manner attempted in this case.

32 The fourth section makes it the duty of "the treasurer of each private corporation" to assess the tax imposed by the act upon the nominal value of the evidences of indebtedness of the corporation and to retain the tax out of interest paid. But this applies to "private corporations" only, and there is no reference whatever anywhere to municipal corporations, except in the proviso to sec. 6, which directs "that the taxable person shall not include" in the return he is required to make of the "aggregate amount of all matters owned by him, made taxable by this act," upon the blank to be furnished to him by the local assessor, the obligations of public * * * corporations, the tax on which is required by law to be collected from the holder of such obligations and paid into the State treasury by the corporation." This proviso excludes the presumption that the tax on municipal bonds is to be assessed and collected by

the local assessors and collectors, but it does not aid us in determining how it is to be assessed and collected.

It is contended, however, on behalf of the Commonwealth that the mode of assessment and collection is prescribed by sec. 42 of the act of 1844 (P. L., 501), the language of which is as follows: "That if the county shall pay into the State treasury its quota of tax levied on its said adjusted valuation fifteen days prior to the first day of August in any year such county shall be entitled to an abatement of five per cent. on the amount so paid, and any State tax remaining unpaid by any individual or corporation after said tax is due and payable by said county to the Commonwealth shall bear an interest of six per cent., and be a lien on the estate on which it is charged till fully paid and satisfied, and that it shall be the duty of the treasurer of each county, incorporated city, district, and borough of this Commonwealth, on the payment of any dividend or interest to any holder or agent claiming the same, on any scrip, bond, or certificate of indebtedness issued by said incorporated city, district, and borough aforesaid, to assess the tax herein made and provided for State purposes upon the nominal value of each and every said evi-
dence of debt, said tax to be deducted by the said treasurer
33 on the payment of any interest or dividend aforesaid, and the
same shall be held by him until paid over to the State treasurer, and the said treasurer shall be subject to the same penalties and liabilities now prescribed by existing laws in relation to taxes on bank dividends."

Defendant contends that if this be the act and section under which the tax is claimed and settlement made it cannot be sustained, because the assessment provided for is to be upon the nominal and not upon the real value of the evidences of indebtedness, and that therefore the taxes are not uniform, as they are required to be by the Constitution.

We think this objection is well founded for the reasons stated in the opinion recently filed in Commonwealth *v.* Delaware Division Canal Company, No. 170, September term, 1887, Dauphin county common pleas, which, without repeating, we here adopt.

It is undoubtedly true that the want of uniformity shown by the facts proved in that case is much more glaring than that which could be inferred, if the facts found in this case were alone in view; but the constitutionality of an act of Assembly cannot be determined by nor depend upon the facts proved in a particular case. If the inevitable, necessary effect of administering a taxing act in the manner in which the Legislature directs it to be administered be to produce want of uniformity in the taxes, the act is unconstitutional and cannot be applied to any case. "The constitutional validity of a law is to be tested not by what has been done under it but what may, by its authority, be done." Stuart *v.* Palmer, 74 N. Y., 188.

We need not stop to discuss the objection that the assessment is not valid without a valuation. It is alluded to in the opinion above cited, and it is, any rate, involved in the objection of want of uniformity, for if the assessment at the nominal value result in uniformity of taxes this result would show that it was made on a sub-

stantially correct valuation; if the necessary result is want of uniformity in the taxes they cannot be sustained, even if such an assessment be considered a valuation.

34 Defendant contends further that if this tax be claimed under said act of 1844 it is illegal and the act is invalid, because it does not provide for notice to and right of appeal by the bondholder, and that no notice or opportunity for appeal was actually given.

It is conceded that this is a tax upon the bondholder, and that it is payable by him, in the first instance, out of the interest due upon his bonds.

He has, therefore, the same rights that other tax-payers have with respect to notice and opportunity to appeal.

We do not consider it necessary to enter into any elaborate discussion to show that a tax-payer has the constitutional right to notice an opportunity of appeal before he becomes finally bound for the tax. We shall merely refer to a few cases and opinions of judges on this subject out of a multitude that might be cited. The principle that, as was said by Agnew, J., in Philadelphia *v.* Miller, 49 Pa. St., 448, "Notice or at least the means of knowledge is an essential element in every just proceeding which affects rights of persons or property," is fundamental, and is applicable to tax proceedings by its terms, because they do affect rights and persons and property.

In tax proceedings "it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; * * * and we should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right." (Cooley on Taxation, 265–6.)

"Many provisions in our statutes, regulating the imposition of taxes, must be considered directory merely. Some are doubtless conditions, such as those which are intended to secure an equality of taxation or burdens among the citizens—that is, that the citizen may know for what he is taxed, know his valuation, and have notice of the time and place of appeal." (Insurance Co. *v.* Yard, 11 Pa. St., 338.)

In Stuart *v.* Palmer, *supra*, a law authorizing an assessment without providing for notice and right of appeal was held unconstitutional and void. In this case the subject is fully discussed

35 and many authorities are cited. See also Thomas *v.* Gain, 35 Mich., 155 (S. C. 24 Am. R., 535); and County of San Mateo *v.* Southern Pacific Railroad Company, 13 Fed. R., 722.

The nature and form of the notice is very much in the discretion of the Legislature, but, as in the act of 1844, there is no notice whatever of any kind provided for, it must, in our opinion, for that reason be declared unconstitutional.

We do not, in thus deciding, overlook the fact that this section of this act has apparently had the sanction of the courts in several cases. We do not understand, however, that this precise question

has ever been authoritatively considered or decided, at least since the adoption of the Constitution of 1874.

What we have said thus far has been said upon the assumption that section 42 of the act of 1844 is still in force, but we are by no means certain that this is the case.

The "act imposing additional taxes for State purposes, and to abolish the revenue board," approved April 30, 1864 (P. L., 219), contains the following:

"SECTION 4. That the treasurer of each county and city, the burgess or other chief officer of each incorporated district or borough of this Commonwealth, within ninety days after the passage of this act, shall make return under oath or affirmation to the auditor general of the amount of scrip, bonds, or certificates of indebtedness outstanding by said county, city, district, borough, or incorporation, as the same existed on the first day of January, one thousand eight hundred and sixty-four, and of each succeeding year thereafter, together with the rates of interest thereon, at each of those periods, under the penalty of five thousand dollars, the amount to be settled by the auditor general, and the amount thereof sued for and collected as debts due by defaulting officers are collected: Provided, That on the receipt of said returns the auditor general shall proceed to settle the accounts of each county, city, and borough with the Commonwealth, fix the State tax due and unpaid, and transmit notice of the amount by mail to officers making said returns, and that if the amount, so found due shall not be paid within sixty days the attorney general shall sue and collect the same, with interest from the date of such settlement; and hereafter it shall be the duty of the treasurer of every county, city, borough, and
36 incorporated district in this Commonwealth to deduct the said State tax on payment of any interest or dividend on debts due by the county, city, borough, or incorporated district and pay the same over to the State treasurer within thirty days after the said interest or dividend has fallen due." And in section 8 all acts inconsistent with this act are repealed.

This section, it will be seen, requires the treasurers of municipalities to make return of the indebtedness and rate of interest as of the first day of January in each year, and requires the auditor general to "fix the State tax due and unpaid" on the receipt of said returns and to transmit notice of the amount to the treasurers, who are to deduct the said State tax on payment of any interest on debts due by the municipality. The intention of this would seem to be that with the amount of the indebtedness before him and the rate of interest which it bears the auditor general is to "fix the State tax due and unpaid" —that is, to value and assess the evidences of indebtedness and transmit notice of the amount to the treasurers that they may know what sum to deduct when paying interest. To say the least, the language used would bear this construction, and if this be its meaning it is plainly inconsistent with section forty-two of the act of 1844, which directs the treasurers to assex the tax on the nominal value of the evidences of indebtedness.

But even if this be the true construction of the act of 1864, which

we do not decide, it will not help the case of the Commonwealth, for in that event the proceedings in this case are fatally defective. No report was made as of the first of January in any year to the auditor general, nor did he, so far as has been shown, fix the amount of the tax and transmit the required notice to the treasurer, and therefore the tax has not been assessed as required by the act; and even if all this had been done the fatal objection of want of notice to the bondholders and opportunity to appeal would still remain.

There is also the additional objection to both of these acts that they require the assessment of the tax upon and its retention from the interest on all the evidences of indebtedness of the mu-
37 nicipalities, without regard to whether they are owned by residents of the State or non-residents, although it has been determined by the Supreme Court of the United States that non-resident bondholders cannot be taxed. Case of State Tax on Foreign-Held Bonds, 15 Wall., 300.

The Constitution, besides requiring all taxes to be uniform, ordains also that they "shall be levied and collected under general laws." We have grave doubts whether both section 42 of the act of 1844 and section 4 of the act of 1864 are not repugnant to this clause. We know not what it means nor to what it can be applied, unless it be that all taxes on the same class of subjects must be levied and collected under the same general laws; that the taxes on part of a given class of subjects cannot be levied and collected under a law which applies to them only and prescribes a mode in which they are to be levied and collected different from that in which the taxes on the remaining subjects of the same class are to be levied and collected under the general laws. If this be so and if municipal loans be a part of the class of subjects described in section 1 of the act of 1885 as "all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, * * * and all public loan and stocks whatsoever * * * and all other monied capital in the hands of individual citizens, then it would seem that, as the taxes on these municipal loans are not levied and collected under the general laws, there is a violation of the mandate of the Constitution in the attempt to levy and collect them under these special laws.

The Constitution forbids the Legislature to "pass any local or special law * * * regulating the affairs of counties, cities, townships, wards, boroughs, or school districts." Several cases have arisen calling for a construction of this clause, and it has been shown in deciding them that a law which affects part of a class only is a special law. Thus it was said by Paxson, J., in Wheeler *v.* Philadelphia, 77 Pa. St., 338, on page 351, "We do not think the classification of cities as contained in the act of May 23, 1874, offends
38 against any constitutional provision." This construction does not open the door to special legislation. It permits legislation for classes, but not for persons or things of a class." To the same effect Scowden's Appeal, 96 Pa. St., 243, and McCarthy *v.* Commonwealth, 110 Pa. St., 243.

The constitution of New Jersey contains the same inhibition as to

regulation of affairs of counties, &c., and the same view of what constitutes special legislation has been taken by the court of errors and appeal of that State. Thus in State *v.* State Board of Assessors, 48, N. J. L., it is said: "Interdicted local or special laws are those that rest on a false or deficient classification. Their vice is that they do not embrace all of the class to which they are naturally related." And in the same case, which is a tax case, the court say the same rule for determining what is general and what is pecials legislation must be applied to the constitutional mandate that property must be assessed for taxes under general laws. These considerations seem to make it at least doubtful whether these sections of the act of 1844 and the act of 1864 are not both unconstitutional and void, because they are special laws for levying and assessing taxes.

The case before us does not require us to resolve this doubt, and we therefore leave it as one of the least difficult of the many questions that present themselves whenever the revenue acts present themselves for consideration.

Almost the only thing that is certain about these tax laws as they now stand on our statute books is that they are a rude undigested mass, most of them without form and many of them void, in the legal sense of that word.

For the purposes of this case we have reached the following

Conclusions of law.

1. That the settlement appealed from in this case is illegal and invalid, because the taxes claimed therein are not uniform, as required by article IX, section 1, of the Constitution.

2. That said settlement is illegal and invalid because the laws under which it was made and under which the taxes em-
39 braced in it are claimed do not provide for any notice to or right of appeal by the owners of the municipal loans, who are claimed to be liable for the tax.

3. That defendant is entitled to judgment in its favor.

Judgment is therefore directed to be entered in favor of defendant unless exception be filed within the time limited by law.

J. W. SIMONTON,
President Judge.

Exceptions Filed by the Commonwealth in the Court Below, May 8, 1888.

1. The learned court erred in its third finding of facts as follows: "3. The report of the bonded indebtedness of the city, defendant, made by its treasurer, contained the following: 'I, Henry Hinkson, treasurer of the city of Chester, have made this report on the bonded indebtedness of the city of Chester, and have filled up the blanks herein at the request of the auditor general of the State of Pennsylvania, and by advice of counsel I hereby protest against being required to make this return; and I further protest that I have no power to make any assessment of the said bonds for taxation, and I further state that I have no assessment thereof and have not been anthorized by law so to do. I further protest that the tax sought to

be levied upon the bonds issued by the city of Chester through me by means of this report and a settlement made by the auditor general and State treasurer thereon against me for said tax is void under the Constitution of the United States and of the State of Pennsylvania for want of a valid assessment and for inequality;' and we find as a fact that he made no assessment."

2. The learned court erred in its first conclusion of law as follows:

"1. That the settlement appealed from in this case is illegal and invalid because the taxes claimed therein are not uniform, as required by article IX, section 1, of the Constitution.

40 3. The learned court erred in its second conclusion of law as follows:

"2. That said settlement is illegal aud invalid, because the laws under which it was made and under which the taxes embraced in it are claimed do not provide for any notice to or right of appeal by the owners of the municipal loans, who are claimed to be liable for the tax."

4. The learned court erred in its third conclusion of law as follows:

"3. That the defendant is entitled to judgment in its favor."

5. The learned court erred in not directing judgment in favor of the Commonwealth for the amount of the tax in question.

6. The learned court erred in not holding that it was incompetent for the defendant to set up as a defense "that the settlement appealed from in this case is illegal and invalid because the taxes claimed therein are not uniform, as required by article IX, section 1, of the Constitution."

7. The learned court erred in not holding that it was incompetent for the defendant to set up as a defense "that the said settlement is illegal and invalid because the laws under which it was made and under which the taxes embraced in it are claimed do not provide for any notice to or right of appeal by the owners of the municipal loans, who are claimed to be liable for the tax."

Opinion of the Court upon Exceptions.

May 18, 1888.—The exceptions overruled and judgment directed to be entered in accordance with the opinion heretofore filed.

J. W. SIMONTON, *P. J.*

41 In the Supreme Court of Pennsylvania in and for the Middle District of said Court.

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following 1st Monday of January, A. D. 1888—present, Hon. Isaac G. Gordon, chief justice, and Hon. Edward M. Paxson, James P. Sterrett, Henry Green, Silas M. Clark, and Henry W. Williams, justices, and William Pearson, prothonotary of the said supreme court of Pennsylvania in and for the said middle district, to May term, 1888, No. 31—it is contained as follows, to wit:

(*Copy of Supreme Court Docket Entries.*)

Writ of error to the court of common pleas of Dauphin county.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, *vs.* CITY OF CHESTER, Defendant Below. } No. 191. March Term, 1887.

May 18, 1888.—Precipe filed.

Eo die, exit writ of error r't'ble May 28, 1888.

May 26, 1888.—Record returned and filed.

May 28, 1888.—Continued and ordered to head of list at western district.

Sept. 26, 1888.—Assignments of error filed.

Jan. 9, 1889.—Argued in eastern district.

Feb. 4, 1889.—Judgment reversed and judgment entered in favor of the Commonwealth and against the defendant in the sum of $1,341.45, with interest at the rate of 12 per cent. per annum from the 6 day of Feb., 1887, and costs.

Per CLARK, *J.*

42 Feb. 13th, 1888.—Writ of error from the Supreme Court of the United States received and filed.

Eo die, petition for allocatur of said writ by said court.

Allocatur of said writ by Hon. Joseph P. Bradley, justice of said court; writ of error bond, in the sum of $2,800, approved by said Hon. Joseph P. Bradley, received and filed.

March 8th, 1889.—Citation from said Hon. Joseph P. Bradley and affidavit of service thereof on Hon. W. S. Kirkpatrick, attorney general of Pa., filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of Supreme Court.

Precipe. Filed May 18, 1888.

43 Precipe.

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, Plaintiff in Error, *vs.* CITY OF CHESTER, Defendant Below, Defendant in Error.

Issue writ of error to the court of common pleas of Dauphin county to remove the record and proceedings in a certain action of assumpsit depending therein to No. 191, of August term, 1887, returnable to May term, 1888.

JOHN P. SANDERSON.
Deputy Attorney General, Attorney for Plaintiff in Error.

To William Pearson, prothonotary supreme court of Pa., middle district.

44 (*Writ of Error.*)

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Seal of the Supreme Court.

Beeause in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between The Commonwealth of Pennsylvania, plaintiff in error, and The City of Chester, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday following the 1st Monday of June, 1888, being the 1st Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what ef right and according to our laws and customs ought.

Witness the Honorable Isaac G. Gordon, doctor of laws, chief justice of our supreme court, at Harrisburg, the 18th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Commonwealth the one hundred and twelfth.

WILLIAM PEARSON,
Prothonotary.

45 (Indorsement on writ of error:) No. 31. May term, 1888. Supreme court, middle district. Com. of Penna., plaintiff in error, *vs.* City of Chester, defendant in error. Filed May 21st, 1888. Writ of error to the court of C. P. for the county of Dauphin. (No. 191, March term, 1887.) Returnable the 21st Mon. foll. 1st Monday of January, 1888. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—10 days' notice to the parties or counsel below is necessary to compel an appearance. Filed in supreme court May 26th, 1888. Service of writ accepted by def't. J. W. M. Newlin.

(*Return from Court of Common Pleas.*)

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]

46 IX.

Specifications of Error.

1. The learned court below erred in its third finding of fact as follows:

"The report of the bonded indebtedness of the city defendant made by its treasurer contained the following: 'I, Henry Hinkson, treasurer of the city of Chester, have made this report of the bonded indebtedness of the city of Chester, and have filled up the blanks herein at the request of the auditor general of the State of Pennsylvania, and by advice of counsel I hereby protest against being required to make this return; and I further protest that I have no power to make any assessment of the said bonds for taxation, and I further state that I have made no assessment thereof and have been authorized by law so to do. I further protest that the tax sought to be levied upon the bonds issued by the city of Chester through me by means of this report and settlement made by the auditor general and State treasurer thereon against me for said tax is void under the Constitution of the United States and of the State of Pennsylvania for want of a valid assessment and for inequality,' and we find as a fact that he made no assessment."

2. The learned court below erred in its first conclusion of law as follows:

"That the settlement appealed from in this case is illegal and invalid because the taxes claimed therein are not uniform, as required by article IX, section 1, of the Constitution."

3. The learned court below erred in its second conclusion of law as follows:

"That said settlement is illegal and invalid because the laws under which it was made and under which the taxes embraced in it are claimed do not provide for any notice to or right of appeal by the owners of municipal loans who are claimed to be liable for tax."

47 4. The learned court below erred in its third conclusion of law as follows:

"That the defendant is entitled to judgment in its favor."

5. The learned court below erred in not entering judgment for the Commonwealth for the amount of the tax in question.

6. The learned court below erred in not holding that it was incompetent for the defendant to set up as a defense that the settlement appealed from in this case is illegal and invalid because the taxes claimed therein are not uniform, as required by article IX, section 1, of the Constitution.

7. The learned court erred in not holding that it was incompetent for the defendant to set up as a defense that the said settlement is illegal and invalid because the laws under which the taxes embraced in it are claimed do not provide for any notice to or right of appeal by the owners of the municipal loans who are claimed to be liable for the tax.

(*Opinion of the Supreme Court of Pennsylvania. Filed Feb.* 4, 1889.)

48 In the Supreme Court of Pennsylvania, Middle District.

COMMONWEALTH OF PENNSYLVANIA *vs.* CITY OF CHESTER. } No. 31. Error to the Court of Common Pleas of Dauphin County. May Term, 1889.

CLARK, *J.:*

This is an appeal by the city of Chester from a settlement by the auditor general and State treasurer, under the act of 1811, for taxes on municipal loans of the said city for the year ending the first Monday of November, 1886. This case was tried without a jury, under the act of April 22d, 1874.

The defendant is an incorporated city of this State having a bonded indebtedness outstanding amounting to $406,500. The settlement purports to have been made pursuant to the act of June 30th, 1885, P. L., 193. This is not wholly inaccurate, however, as the rate according to which the settlement was made is fixed by the act of 1885; but the settlement might more properly be said to have been made under the 42d section of the act of April 29th, 1844, P. L., 501, from which the accounting officers derive their authority to act. This blunder is a matter of little importance, however, if the settlement was made under authority of law at the rate established by the act of 1885. It is contended, in the first place, that this provision of the act of 1844 was repealed by the fourth section of the act of April 30th, 1864, P. L., 218. The announcement of that conclusion by this court, after the lapse of almost a quarter of a century, during all of which time State taxes on municipal loans have been regularly collected under the act of 1844 without ques-
49 tion, would certainly be a surprise to the profession. In the very recent case of Commonwealth *vs.* Martin, 107 Pa., 105, however, the precise question was distinctly raised, and it was there plainly and explicitly ruled that the 42 section of the act of 1844 was not repealed by the act of 1864, but that the same remains in full force. To the same effect is the reasoning of this court in Commonwealth *vs.* Lehigh Valley R. R. Co., 104 Pa., 106, and of several of the cases there cited. That question may be considered settled.

The return of the city of Chester does not show that any of the bonds were held by non-residents of the State. It may fairly be implied from the return that the bonds were all in the hands of resident owners. No question as to that can therefore arise. The remaining questions raised upon this record are considered and determined in our opinion filed in the case of Commonwealth *vs.* Delaware Division Canal Co., argued at the present term.

The judgment is reversed and judgment is now entered in favor of the Commonwealth and against the defendant for one thousand three hundred and forty-one dollars and forty-five cents ($1,341.45), with interest at the rate of 12 per cent. per annum from the 6th day of Feb., 1887, and costs.

50 And now here, on this day, to wit, February 13, 1889, the said city of Chester produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the 2nd Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

51 (*Petition for Allocatur.*)

To the Honorable Edward M. Paxson, chief justice of the supreme court of Pennsylvania:

The petition of the city of Chester respectfully showeth—

That the Commonwealth of Pennsylvania brought suit into the supreme court of Pennsylvania for the middle district, to May term, 1888, No. 31, by writ of error from a judgment of the court of common pleas of Dauphin county, of March term, 1887, No. 191, in which suit in the said supreme court The Commonwealth of Pennsylvania was appellant and plaintiff in the court of common pleas of Dauphin county and your petitioner was defendant in the court of common pleas of Dauphin county and appellee in the supreme court of Pennsylvania; that your petitioner is a municipal corporation of the State of Pennsylvania, and that the said suit in the said court of common pleas of Dauphin county was an appeal from a settlement made by the auditor general and State treasurer of Pennsylvania on December 18, 1886, charging your petitioner with a tax of three mills on its entire bonded indebtedness of $406,500 for the year ending the first Monday of March, 1886, which was claimed by the Commonwealth of Pennsylvania under section four of the act of June 30, 1885, and under section forty-two of the act of April 29, 1844. Under these acts the Commonwealth of Pennsylvania sought to tax the owners of bonds of the city of Chester three mills annually upon the nominal value of the said bonds, and required the treasurer of the city of Chester to retain from the interest stipulated to be paid to said bondowners the amount of said tax and pay it into the city treasury, aud undertook to authorize the city treasurer to pay to its bondowners only the balance of said interest in full discharge of its liability to said bondowners. Your petitioner
52 further shows that said acts did not contemplate laying any tax on either the treasurer of the city of Chester or upon the said municipality; and your petitioner averred in its said appeal from the settlement so as aforesaid made against it by the auditor general and State treasurer that it was not liable to the tax of

$1,167.30 charged against it in the said settlement or to pay any part of the same, because your petitioner claimed that the said tax claimed by the Commonwealth of Pennsylvania was in contravention of the fourteenth amendment to the Constitution of the United States, for the following reasons:

Said settlement of account of December 18, 1886, was based upon a report made by the treasurer of the city of Chester to the auditor general, which was made under protest, in the words and figures following, to wit:

E—Form 1.

Report and Assessment of the Bonded Debt of the City of Chester for the Year Ending First Monday of November, 1886, *with Rate of Interest and Date of Payments of the same during the Period aforesaid.*

Description of debt.	Amount.	Assessment at nominal value.	Rate of interest.	Date of payment of interest.
Registered bonds	$55,500 00	$55,500 00	6	Jan. & July.
	231,000 00	231,000 00	5	Jan. & July.
	120,000 00	120,000 00	4	Jan. & July.
	$406,500 00			

NOTE.—The above figures are inserted in compliance with the requirement of the auditor general. They do not represent the real value of the bonds and no portion of the endorsed protest is hereby waived.

I, Henry Hinckson, treasurer of the city of Chester, have made this report on the bonded indebtedness of the city of Chester, and have filled up the blanks herein at the request of the auditor general of the State of Pennsylvania and by advice of counsel. I hereby
53 protest against being required to make this return, and I further protest that I have no power to make any assessment of said bonds, and I further state that I have made no assessment and have not been authorized by law to make one. I further protest that the tax sought to be levied upon the bonds issued by the city of Chester through me by means of this report and on settlement to be made by the auditor general and State treasurer thereon against me for said tax is void under the Constitution of the United States and of the State of Pennsylvania for want of a valid assessment and for inequality.

(Signed) HENRY HINCKSON,
Treasurer of the City of Chester.

I. The city of Chester claims that this return does not constitute a valid assessment of the bonds therein set forth, and that the same furnishes no legal basis for the collection of a tax upon said loans by requiring appellant to withhold said tax from the interest pay-

able to the resident holders thereof, as claimed in the settlement of account herein appealed from.

II. Neither the act of June 30, 1885, nor any other act authorizes the auditor general and State treasurer to settle an account against the appellant, The City of Chester, for said tax on loans in the said settlement of account of June 9, 1885.

III. The interest on said loans of the city of Chester varies from four to six per centum and the same mature at different times. By reason of the difference in the rate of interest and the time of maturity of said loans the market value thereof varies.

IV. The Commonwealth claims that all of the loans of the city of Chester held by residents of the State are taxable to said resident bondholders at the nominal or face value of said bonds, without regard to the variations in the real value of the respective series of bonds arising from the difference in the rates of interest payable thereon and the times of maturity thereof.

V. Appellant further says that the act of June 30, 1885, and any other act, in so far as they require appellant to retain from the interest payable to resident holders of bonds of the city of Chester the aforesaid *said* State tax on the nominal value thereof, are void, because the said legislation and attempted taxation are repugnant to article fourteenth, section 1, of the Constitution of the United States, which provides:

"* * * Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant further says that the said requirement is a taking of the property of said bondholders without "due process of law" and denies to said bondholders "the equal protection of the laws;" that said acts of Assembly were forthwith avoided and made null and void by the adoption of the said fourteenth amendment to the Constitution of the United States and by virtue of article fifth of said Constitution of the United States:

(*a.*) Because the Legislature of Pennsylvania cannot lawfully enact that the bonds aforesaid shall be taxed to the resident holders at their nominal value.

(*b.*) Because the ascertainment of the value of taxable property is an executive and not a legislative function.

(*c.*) Because by the law of the land all taxes on property must be by a valuation thereof.

54 (*d.*) Because the valuation must be uniform. Other personal property is taxed at its real value on notice to the owner.

(*e.*) Because the valuation must be by duly qualified assessors under the sanction of the law.

(*f.*) Because no provision of law is made for officers to estimate and appraise the value of said bonds.

(*g.*) Because no assessment thereof whatever is provided for.

(*h.*) Because the bondholders are given no notice and no time and no opportunity either before or after the payment of the tax to be heard respecting its validity or correctness.

(*i.*) Because the statutory provisions aforesaid are framed so that bondholders cannot thereunder be made parties or intervene in any way concerning the said tax either before or after the collection thereof.

(*j.*) Because the State of Pennsylvania has provided no means whereby the holders may make payment under protest and then sue the State to recover said illegal tax.

(*k.*) And the said city of Chester further contended that the tax was void as impairing the city's obligation to its creditors by requiring the city of Chester to retain from its bondowners a portion of the interest stipulated to be paid on their bonds as a State tax on said bonds without notice to said bondowners, contrary to the provisions of the Constitution of the United States.

Petitioner further avers that upon the trial of this cause in the court of common pleas of Dauphin county your petitioner submitted to the said court of common pleas of Dauphin county certain points embodying the aforesaid claims under the Constitution of the United States, all of which points were negatived by the said common pleas of Dauphin county, but the cause was decided in favor of your petitioner on other grounds arising under the constitution of Pennsylvania; that thereupon the Commonwealth of Pennsylvania took a writ of error to the supreme court of Pennsylvania, middle district herein, to May term, 1888, No. 31, and that upon the argument of the said writ of error in the supreme court of Pennsylvania the Commonwealth of Pennsylvania contended that the tax claimed from the petitioners was valid both under the constitution of Pennsylvania and the Constitution of the United States for
55 the reasons heretofore set forth.

Your petitioner further avers that upon the 4th day of February, 1889, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment of the court of common pleas of Dauphin county to be reversed, and thereupon upon the same day ordered judgment to be entered in favor of the Commonwealth of Pennsylvania and against your petitioner for $1,341.45, with interest at twelve per centum from February 5, 1888, and costs being State tax of three mills on the portion of the bonds of your petitioner held by residents of Pennsylvania, notwithstanding your petitioner's contention that said tax was wholly void under the several provisions of the Constitution of the United States, as heretofore set forth; which said judgment was afterwards, upon the 5th day of February, 1889, duly entered and recorded in the middle district of the supreme court of Pennsylvania as aforesaid.

Your petitioner further shows that the said judgment of the said supreme court of Pennsylvania is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final; that the right, title, privileges, and immunities claimed by your petitioner, defendant and appellee aforesaid, were claimed under the provisions of the Constitution of the United States as hereinbefore particularly set forth.

That article 3, section eight, of the Constitution of the United States provides that the judicial power of the United States shall extend

to all cases of law and equity arising under the Constitution and laws of the United States referring to the said subject-matters, all of which appears of record.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and
56 immunity so claimed by your petitioner under the Constitution of the United States.

That the said court of common pleas of Dauphin county and the said supreme court of Pennsylvania in the said judgment herein entered against the petitioner affirmed the constitutionality of the said forty-second section of the act of April 29, 1844, and said fourth section of the act of Assembly of the Commonwealth of Pennsylvania of June 30, 1885, entitled "A further supplement to an act entitled An act to provide revenue by taxation," approved the seventh day of June, 1879, and therefore the said proceedings and judgment aforesaid are null and void and contrary to the Constitution and statute laws of the United States in the premises.

Your petitioner therefore prays for the allowance of a writ of error to the supreme court of Pennsylvania in order that the said judgment of the supreme court of Pennsylvania may be reviewed and reversed or affirmed in the Supreme Court of the United States, and it will ever pray, etc., etc.

CITY OF CHESTER, *ss:*

The City of Chester, by the mayor of the said city of Chester, deposes and says on behalf of the said city of Chester that the facts in the above petition stated are true to the best of his knowledge and belief.

Sworn to and subscribed before me this — day of ——, 1889.

—— ——.

57 *Copy of Section* 42, *Act of* 29 *April*, 1844.

* * * And that it shall be the duty of the treasurer of each county, incorporated city, district, and borough of this Commonwealth, on the payment of any dividend or interest to any holder or agent claiming the same on any scrip, bond, or certificate of indebtedness issued by said incorporated city, district, and borough aforesaid, to assess the tax herein made and provided for State purposes upon the nominal value of each and every said evidence of debt; said tax to be deducted by the said treasurer on the payment of any interest or dividend aforesaid, and the same shall be held by him until paid over to the State treasurer, and the said treasurers shall be subject to the same penalty and liabilities now prescribed by existing laws in relation to taxes on bank dividends.

Section 4 of the act of 30 June, 1885, provides as follows:

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation incorporated by or under the laws of this Commonwealth or the laws of any other State or of the United States and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness

issued by said corporation to residents of this Commonwealth and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt and to report on oath annually on the first Monday of November to the auditor general the amount of indebtedness of the corporation owned by residents of this Commonwealth as nearly as the same can be ascertained, and it shall be its further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State treasury within fifteen days after the thirty-first day of December in each year, and his compensation for his services shall be the same that city and borough treasurers receive for similar services, and for every failure to assess and pay said tax and make report as aforesaid the auditor general shall add ten percentum as a penalty to the amount of the tax; on payment of said tax by a corporation the bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

(*Allowance of Writ of Error.*)

Writ of error allowed Feb. 11th, 1889.

JOSEPH P. BRADLEY,
Asso. Justice S. C. U. S.

58 (*Writ of Error Bond.*)

Know all men by these presents that we, The City of Chester, William Appleby, and Benjamin W. Blakeley, both of said city and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of $2,800, lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney; to which payment, well and truly to be made, we do bind ourselves, our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of February, 1889.

Whereas lately, in the supreme court of Pennsylvania for the middle district, to May term, 1888, No. 31, upon a writ of error to review a judgment of the common pleas of Dauphin county to March term, 1887, No, 191, wherein The Commonwealth of Pennsylvania was plaintiff and also appellant in the supreme court of Pennsylvania and The City of Chester was defendant and appellee in the supreme court of Pennsylvania, the judgment of the court of common pleas in favor of City of Chester was reversed and judgment was entered by the supreme court of Pennsylvania on Feb. 4th, 1889, in favor of the Commonwealth of Pennsylvania and against the City of Chester for the sum of $1,341.45, with interest and costs; and the said City of Chester having obtained a writ of error from the Supreme Court of the United States to review said judgment of the supreme court of Pennsylvania, and having filed a copy thereof in the office of the prothono-

59 tary of said court, and having obtained a citation, directed to the said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, A. D. 1889, next ensuing:

Now, the condition of this obligation is such that if the City of Chester shall prosecute said writ of error with effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to be and remain in full force and virtue.

JOS. R. T. COATES. [L. S.]
WILLIAM APPLEBY. [L. S.]
B. W. BLAKELEY. [L. S.]

[Seal of the City of Chester.]

Sealed and delivered in the presence of—
W. W. WARD.
S. W. WARD.

Approved as a supersedeas bond.

JOSEPH P. BRADLEY,
Associate Justice of Sup. Court of U. S.

STATE OF PENNSYLVANIA, } *ss:*
City of Harrisburg, }

In testimony that the foregoing, contained on pages 1 to —, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 31, May term, 1888, in the middle district, wherein The Commonwealth of Pennsylvania was plaintiff in error and City of Chester was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 8th day of March, A. D. 1889.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

[Endorsed:] City of Chester *vs.* Commonwealth of Pennsylvania. Error to S. C. of Pennsylvania. Transcript of record.

Endorsed on cover: Pennsylvania supreme court. No. 1498. The City of Chester, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed October 31, 1889.

FILED
JAN 25 1890
JAMES H. McKENNEY

No. 1498. October Term, 1889.

IN THE

Supreme Court of the United States

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

Error to the Supreme Court of Pennsylvania.

Brief on behalf of the City of Chester on motions to revoke allocatur, etc., and to dismiss and affirm.

JAMES W. M. NEWLIN,
For Appellant.

BURK & MIFFLINBOCE, PRS. PHILADA.

[Transcript, page 33.] *Second*, the affidavit of counsel for the appellant shows that this particular paper "was handed by deponent to the Court of Common Pleas of Dauphin county, upon the trial, together with the specifications of appeal printed on pages 4, 5 and 6 of the manuscript of the record herein." * * * "These points were simply handed up to the Court on the trial, and had not been previously filed." [See appendix to this brief.]

Not only, therefore, is the allegation of the Commonwealth not supported by the facts, but that portion of the record, which is undisputed by the Commonwealth, shows that the motion is a frivolous one because it is based upon the assumption that if "the points" were not presented at the trial, the Federal questions therein raised would not be before this Court for action. On page 4, of the transcript of the record herein, there appears a paper called "appeal and specifications," which distinctly presents Federal questions, and, on page 11 of the transcript of the record herein, it appears from the stenographer's notes that upon the trial of the case, the counsel for the appellant offered in evidence this very paper, to wit: "Specifications of appeal," and this paper is referred to again in the beginning of the opinion of the trial Court, printed on page 15 of the transcript of the record herein. By comparing the two papers, to wit: "Appeal by the City of Chester," printed on pages 4, 5 and 6 of the transcript of the record herein, and the paper marked "defendant's findings of law," printed on pages 14 and 15 of the transcript of the record herein, it appears that they are practically identical, and that the same Federal questions are raised in both these papers. How the learned Attorney-General, in view of this undisputed part of the record, can assert that the Federal questions were not raised, in the Courts below, it is difficult to understand.

JAMES W. M. NEWLIN,
Attorney for Appellant.

CITY OF CHESTER	SUPREME COURT U. S.
vs.	October Term, 1889.
COMMONWEALTH OF PENNA.	No. 1498.

MOTION TO DISMISS AND AFFIRM.

Counter-statement for the Appellant.

The motion to dismiss and affirm is based upon the suppositions, 1st, that no Federal question was properly raised, 2d, that it is manifest from the record that the writ has been taken for delay, and 3d, that if any color of jurisdiction exists, the questions involved were so manifestly decided right, and are in themselves so frivolous that no argument thereof is necessary. The *first* point has been shown not to be well founded in the preceding pages of this brief. That the *second* point is shown not to be well founded by the transcript of the record, page 13, from which it appears that four different appeals from the City of Chester were tried on December 20, 1887. These appeals were for different years, and it appears by the stenographer's notes (transcript page 9) that one of the cases was tried April 20, 1887, and the case appears to have been retried on December 20, 1887 (transcript page 11). There is no way of nonsuiting the Commonwealth, but the Commonwealth can always compel trial; hence, the delay in trying the appeals was caused by the Commonwealth, the first one having been taken to No. 397, August Term, 1885, and the narr or declaration of the Commonwealth in the case now before this Court having been filed March 30, 1887, and the trial thereon

having taken place April 20, 1887, within twenty days, and the City of Chester having expedited the proceedings by waiving a jury trial (transcript page 9). *Third*, that the Federal questions were neither "manifestly decided right," and that they are not "frivolous" is abundantly shown, it is submitted, by the following argument:—

Foundation of the Judgment Appealed from.

The judgment in the Supreme Court of the State was against the appellant because its Treasurer had refused to deduct, from the interest payable on its bonds, a tax claimed to be due by the bond owners to the State, and for the collection of which the appellant was held personally responsible.

Argument.

For convenience of reference, the order of the Attorney-General's brief is followed instead of that of the Assignments of Error, which were filed after the printing of the transcript of the record.

I. The Federal questions were raised in the State Court.

II. The appellant had a right to raise them.

III. The judgment appealed from was for a tax which was void under the Constitution of the United States.

(*a*) For want of notice.

(*b*) For want of an assessment.

For these reasons the proceeding was not "due process of law," and was a deprivation of "the equal protection of the laws."

(*c*) The tax impaired the obligation of the appellant's contract with its bond owners.

I. The Federal Questions were Raised in the State Courts.

The claim of the Commonwealth is for a State tax of three mills on the nominal value of the bonds issued by the appellant, which tax the Treasurer of the appellant is directed to deduct from the interest payable by the terms of the bonds to the bondowners. In order to collect this tax a settlement of account was made against appellant by the Auditor-General under the Pennsylvania Act of March 30, 1811. Purdon's Digest, page 1382, *et seq.* This Act provides that any person dissatisfied with such a settlement may appeal therefrom to the Court of Common Pleas of Dauphin county, and shall file specifications of objections to the settlement which the Court is authorized to determine thereon. Purdon's Digest, page 1386, pl. 28. In this case, such an appeal was made and specifications of objections were filed under said Act with the Auditor-General, and by him transmitted to the Court of Common Pleas of Dauphin county. The whole proceeding is based upon these specifications. The most cursory examination of them, as printed on page 4 *et seq* of transcript of the record, will show that the Federal questions were there raised in the record. This disposes of the Attorney-General's suggestion that the Federal questions were not raised, and of what is said on pages 6 and 7 of the Attorney-General's brief. The citations have nothing to do with the case, as there never is any such thing as a bill of exceptions in cases of this kind; besides, the "second conclusion of law" of the trial judge distinctly states the tax to be invalid for want of notice to the bond owner, who is the person taxed.—The treasurer only being employed as a convenient agency of the State. (Transcript, p. 21.)

Murray vs. *Charleston*, 96 U. S. Rep., 432.

In this case the opinion was delivered by Justice Strong, and on page 440 it is said, "It is objected that we have no

jurisdiction of the case because it is said that no Federal question was raised of record, or decided in the Court of Common Pleas where the suit was commenced." * * * On page 441, the Court continues as follows: "The jurisdiction of this Court over the judgments of the highest Courts of the State is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation this Court is authorized to interfere. The form and mode in which the Federal question is raised in the State Court is of minor importance if, in fact, it was raised and decided." * * *

Page 442. "The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that Court *could not have been given without deciding upon a right or authority claimed to exist under the Constitution, Laws or Treatise of the United States, and deciding against that right.* Very little importance has been attached to the inquiry whether the Federal question was formally raised." In *Crowell* vs. *Randall*, 10 Pet., 368, it was laid down after a review of almost all our previous decisions "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment."

II. The Appellant had a Right to Raise the Federal Questions for its own Benefit.

The appellant is directly interested in the Federal question, because it is made the involuntary tax collector for the State, and is required to deduct the tax from the interest and is made a principal debtor to the State therefor. If the appellant does not raise these questions, it must pay the tax to the State, and pay it a second time to the bondowner if it should thereafter be determined that the tax is invalid.

The appellant has a right to raise the Federal question. The learned Attorney-General has quoted eight cases on page 8 of his brief to demonstrate what no one will deny, namely, that a party having no interest in the question cannot set up any title, right, privilege or immunity under the Constitution of the United States. The inference drawn from these cases is that the appellant has no right to invoke the Federal Constitution in this proceeding. This point has been decided, both by the Supreme Court of Pennsylvania and by this Court. It was contended in the State Courts that the appellant had no right to interpose objections to the tax; but the Common Pleas and the Supreme Court both overruled this objection, and held that the appellant could lawfully interpose any objections to the collection of the tax—being liable for the payment of the tax, and being principal debtor, so far as the Commonwealth is concerned. This Court, in the case of *Foreign-held Bonds*, 15 Wallace, entertained the Federal questions then raised on the appeals taken by the railroad companies, which occupy the same position as that of the present appellant. It is true that no question was raised as to the right of the corporation so to do, but the reason for this was that it was not thought such an objection was tenable. It appears, by the affidavit of the Treasurer of the appellant, transcript of the record, page 11, that the interest was paid

to the bondowners in full, and no tax was retained, consequently, the Attorney-General's suggestion that the State laws furnished a remedy to the bondowners, if any need be sought is out of the question here, because the appellant being advised by counsel that the tax was invalid, did not deduct it.

The appellant's liability is fixed before any right would exist in a bondowner to raise any question as to the validity of the tax.

III. (*A*) The Tax is Void for Want of Notice to the Bondowner.

The tax being on the bondowner, and not on the corporation, it is void, because he is given no notice, and he only knows that he has been taxed after his money has got into the State treasury. The appellant may raise this question to protect itself, because, if the tax were paid by appellant, it could not deduct it from the bondowner, *inter alia*, because that person would defend on the ground of want of notice. Want of notice makes the proceeding void, as not being "due process." This is not a specific tax, but a tax on property, and must be upon a valuation with notice.

Want of Notice.

It is manifest that so far as the bondowner is concerned he has no notice at any stage of the proceeding by virtue of which part of his interest money is impounded for the tax. The appellant is in no sense the agent of its creditors, and the so-called assessment made by the settlement appealed from, is simply a *notice* charge made against the debtor as the basis of a tax against the creditor without notice to him. It is exactly as if, in a proceeding by garnishment, it were

attempted in the attachment against the garnishee (without making the debtor a party to ascertain the amount of his debt to the plaintiff) to secure payment from the garnishee without any knowledge on the part of the debtor that anything was claimed to be due by him to the plaintiff in the attachment.

There is no pretence of notice to the taxpayer, *i. e.*, the bondowner, under any of the Acts of 1885, 1864 or 1844; and, for the cogent reasons given by the Court of Common Pleas of Dauphin county, it is submitted that this point is well taken. The question of due process of law is involved in this same point. It is an attempt upon the part of the Commonwealth to save trouble and expense, and also to reach more bonds to levy taxes on A by means of a so-called assessment to B. The tax is not on the Company, but on the resident bondowner, just the same as the Commonwealth taxes the owner of a mortgage. In such a case it has never been pretended that the owner of a mortgage, given by a private individual, could be taxed thereon through a proceeding between the Commonwealth and the mortgagor, of which the mortgagee, who pays the tax, knows nothing until the tax has been paid by his debtor deducting it from the interest and paying it to the Commonwealth, whereby his interest money is diverted from him before it has ever reached him. It seems a work of superogation to cite authorities to show that such a proceeding does not constitute "due process of law."

EXTRACTS FROM THE OPINION OF JUDGE SIMONTON, OF THE COURT OF COMMON PLEAS OF DAUPHIN CO. (transcript, 15 to 21).

Page 18. "We do not consider it necessary to enter into any elaborate discussion to show that a taypayer has the constitutional right to notice an opportunity of appeal before he becomes finally bound for the tax. We shall merely refer

to a few cases and opinions of Judges on this subject out of a multitude that might be cited. The principle that, as was said by Agnew, J., in *Philadelphia* vs. *Miller*, 49 Pa. St., 448, "Notice, or at least the means of knowledge, is an essential element in every just proceeding which affects rights of persons or property," is fundamental, and is applicable to tax proceedings by its terms, because they do affect rights and persons and property."

"In tax proceedings it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; * * * and we should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. (*Cooley on Taxation*, 265-6.)"

"Many provisions in our statutes regulating the imposition of taxes must be considered directory merely. Some are doubtless conditions such as those which are intended to secure an equality of taxation or burdens among the citizens—that is that the citizen may know for what he is taxed, know his valuation, and have notice of the time and place of appeal. *Insurance Co.* vs. *Yard*, 11 Pa. St., 338. In *Stuart* vs. *Palmer*, *supra*, a law authorizing an assessment without providing for notice and right of appeal was held unconstitutional and void. In this case the subject is fully discussed and many authorities are cited. See also *Thomas* vs. *Gain*, 35 Mich., 155 (S. C. 24, Am. R., 535); and *County of San Mateo* vs. *Southern Pacific Railroad Company*, 13 Fed. R., 722."

"The nature and form of the notice is very much in the discretion of the Legislature, but as in the act of 1844, there is no notice whatever of any kind provided for, it must in our opinion for that reason be declared unconstitutional."

Page 21–22. "That said settlement is illegal and invalid, because the laws under which it was made and under which the taxes embraced in it are claimed do not provide for any

notice to or right of appeal by the owners of the municipal loans who are claimed to be liable for the tax."

To recur to the case of a garnishee. Can it be pretended that if A has a claim against B which has not yet gone to judgment, that he can by any legerdemain issue process against C as a garnishee of B, and without making B, the principal debtor, a party, adjudicate the rights of B, ascertain the debt and secure payment thereof from the garnishee out of moneys in his hands belonging to B, who only learns what has been done when C hands over to him in lieu of his money a receipt for so much paid by him as garnishee? This very point has been decided.

Vienne vs. *McCarty*, 1st Dallas, p. 155.

"I have heard of no case which gives a creditor an action against the debtor of his debtor; there is no privity between the parties. An attachment will lie against the debtor himself, and that attachment may be laid in the hands of a third person as garnishee; but to bring the action originally against that third person is, I believe, without example, unless some particular lien appears on the goods or money in his hands."

Now, what is the difference between the cases as to the matter of notice to the principal debtor,—*i. e.*, the resident bondowner?

It is submitted that no ingenuity can suggest any distinction between the cases.

There is not even statutory notice to the bondowner. The most that has ever been contended as to statutory notice is that individual personal notice may, in certain cases, be dispensed with, if the statute gives notice to every one who can be affected by its provisions that some public officials will, under legal sanction, at a specific time and place named in the statute, perform some public act, in the

performance of which the individual citizen to be affected may, if he sees fit, attend and be heard without any further notice.

In *County of San Mateo* vs. *R. R. Co.*, 13 Fed. R., 722, Justice Field discusses the question of "due process of law," as follows:—

"No hearing upon the statement presented is allowed, and when the assessment is made, the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more do away with the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in court can dispense with a right to be heard there by the suitor and his contestant. There being then no provision of law giving to the company notice of the action of the State Board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. *There is something repugnant to all notion of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to the owner any opportunity of being heard respecting the correctness of their action.*

"*Due process of law in the proceeding is deemed to be pursued when*, AFTER THE ASSESSMENT IS MADE *by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers.* Notice to him will be deemed sufficient, if the time and place of hearing be designated by the law. But, whatever the character of the proceedings, whether judicial or administrative, summary or protracted; and whether it takes property directly, *or creates a charge or liability which may be the basis of taking*

it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming, then that notice and opportunity to be heard are indispensable to the validity of the proceedings."

In *Davidson* vs. *New Orleans*, 96 U. S., 104, the Supreme Court of the United States, through Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case:—

"'That whenever, by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of the property without due process of law, however obnoxious it may be to other objections.'"

Hagar vs. *Reclamation District*, 111 U. S., 709.

"Of the different taxes which the State may impose there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent on the extent of his business), and, generally, specific taxes on things or persons or occupations. * * * Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him." * * * p. 713. "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors

appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the States provision is made for the correction of errors committed by them through boards of revision or equalization, sitting at designated periods, provided by law, to hear complaints respecting the justice of the assessments."

South Nashville H. R. R. Co. vs. *Morrow*, Southwestern Rep., Vol. XI, p. 354.

"The assessed bondholders being unknown are, of course, not parties to this proceeding. But inasmuch as a duty and a liability is imposed by the law upon the corporation owing these bonds, it very rightly insists that the law be construed, and its duty defined under the law." * * * "The bond is property, but it is the property of the owner —the creditor and not the debtor. It is not like a share of stock, which is not a debt but which represents the interest owned by the stockholder in the profits of a business conducted here by his agents. The owner of the bond has no interest in the business of the corporation and no control over it whatever." * * * After referring to the fact that the coupon may be owned by one person and the bond by another, whereby it will be impossible to tell whether the tax should be retained or not, the Court continues: "The burden imposed by the act, upon the corporation, with respect to the collection of the tax lawfully assessed, is too onerous and threatens gross injustice. It would have no way to secure itself against liability to either the bondholder, whose interest he has illegally retained, or to the State, for failure to reserve the tax justly due, except by requiring every coupon to be sued on. The whole scheme of the act, insofar as it undertakes to convert corporations into agencies for the collection of a tax upon their bondholders, is fatally defective and void." * * * "Notice was given to the corporation, as the agent of the

bondholder. Under the view we have taken of the act, the corporation is not the agent or representative of the bondholders, hence the assessment of these bonds as omitted property is void."

III. (*B*) The Tax is Void for Want of an Assessment.

Herein is considered also not only the lack of machinery for making any assessment, but also the necessary inequalities inherent in the "nominal value" legislative valuation.

To be very brief, the Treasurer of appellant reported that he had made no assessment and deducted no tax. The Court so found and also demonstrated that he had no power to make an assessment, and also showed that the legislative rule necessarily produced inequality of taxation.

Extract from Opinion of Judge Simonton, in Court of Common Pleas of Dauphin Co. (transcript, p. 16, *et seq*).

Page 16. "2. The actual market value of the bonds bearing interest at the rate of six per centum per annum was, during the year, included in the settlement, sixteen per centum more than the actual value of those bearing interest at four per centum and three per centum more than those bearing interest at five per centum."

Page 16. "3. * * * And we find as a fact that he made no assessment. * * * Page 17. Defendant contends that if this be the act and section under which the tax is claimed and settlement made, it cannot be sustained, because the assessment provided for is to be upon the nominal and not upon the real value of the evidences of indebtedness, and that therefore the taxes are not uniform as they are required to be by the Constitution. * * * It is undoubtedly true that the want of uniformity shown by the facts proved in that case, is

much more glaring than that which could be inferred if the facts found in this case were alone in view; but the constitutionality of an act of Assembly cannot be determined by nor depend upon the facts proved in a particular case. If the inevitable necessary effect of administering a taxing act in the manner in which the Legislature directs it to be administered be to produce want of uniformity in the taxes, the act is unconstitutional and cannot be applied to any case. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done. *Stuart* vs. *Palmer*, 74 N. Y., 188."

"We need not stop to discuss the objection that the assessment is not valid without a valuation. It is alluded to in the opinion above cited, and it is, at any rate, involved in the objection of want of uniformity, for if the assessment at the nominal value result in uniformity of taxes, this result would show that it was made on a substantially correct valuation; if the necessary result is want of uniformity in the taxes, they cannot be sustained, even if such an assessment be considered a valuation." Page 18. "Defendant contends further, that if this tax be claimed under said act of 1844, it is illegal, and the act is invalid because it does not provide for notice to and right of appeal by the bondholder, and that no notice or opportunity for appeal was actually given. It is conceded that this is a tax upon the bondholder, and that it is payable by him in the first instance out of the interest due upon his bonds. He has, therefore, the same rights that other taxpayers have with respect to notice and opportunity to appeal."

There must be a Valuation.

It is affirmed as to this part of the case that, except in specific taxes and license taxes, there can be no taxation of property except by valuation, and that this valuation

must not only be made upon notice to the owner of the property sought to be taxed, but the property must be valued, like any other property, by persons having the authority of assessors, and that the legislature cannot value the property for taxation, nor can it order the assessors in all cases to value the bonds at their nominal or face value without regard to the actual value.

There are two objections to this:—

1. That the legislature is performing an executive act, to wit: making an assessment by fixing an artificial value on the property taxed, which no legislature has power to do.

2. That if it is said that the legislature does not fix a value, but merely prescribes a rule of valuation to be followed by the treasurer of the corporation, the reply is, that the rule thus prescribed makes the assessors' duties purely perfunctory and not only may, but *does necessarily produce inequality of taxation*, because all bonds, without regard to the credit of the obligor, or the rate of interest, or the time of maturity, are to be valued at their nominal or par value, and this gives rise to gross inequalities of taxation. The argument *ab inconvenienti* has no place here, and if it had it may be answered that the actual value of public and of corporation loans can be ascertained quite as readily as the value of their shares of stock, very few of which are listed on the stock exchange.

Legislature Cannot Prescribe Artificial Valuation.

A very little reflection will show that the legislature cannot, under the guise of prescribing a rule of valuation, give to any kind of property an artificial value for the purpose of taxation.

This is a proposition that will bear scrutiny, and the more it is considered the more thoroughly its truth will demonstrate itself.

It needs neither a prophet nor the son of a prophet to point out the endless incongruities which log-rolling would produce in the revenue laws, if the legislature, in what they might be pleased to term a general revenue law, were permitted to call an incongruous division of property a class, and then put artificial value on it—a sort of *fiat* assessment.

Railroad Co. vs. *Commissioners*, 75 N. C., 475, it was held that the legislature of North Carolina had no power to enact that the State Board of Equalization in valuing railroad property should not make it less than $8,000 per mile. The Court say:—

READE, J: "The Constitution, Article V, Section 3, provides that all property, real and personal, shall be taxed by a 'uniform rule' according to its 'true value in money.'"

"The statute (1874-75, Chapter 184, Section 3) provided that 'railroad beds shall be given in the counties where they lie, and that they shall not be valued at less than $8,000 per mile."

"Now, if the Legislature were to enact that every man's land shall be valued at eight dollars per acre without regard to its *real* value, *its* conflict with the Constitution would be manifest. And so if it provided that no man's land should be valued at less than eight dollars per acre, although it be worth much less."

"We have to declare, therefore, that the aforesaid statute under which the defendants made the valuation of the road bed, as we infer from their letter to the plaintiffs, is unconstitutional."

This same point was decided in California in the case of *People* vs. *Hastings*, 34 Cal., 571. It is there laid down that "the Legislature cannot make the original valuation, or authorize any other officer than the assessor to make it. The Legislature may prescribe the mode of making it."

Indeed, acts imposing taxation on property, and undertaking by legislation to fix an imaginary value, are not legislation or taxation, but are confiscation.

If the Legislature can say that the bond of a private individual when taxed to its owner shall be assessed at its real value, and that the bond of a corporation shall be taxed at its nominal value, then there is no limit to the legislative power in this regard. And it might prescribe as well for local as for State taxation on the same basis. It might say

that all frame houses shall pay a tax of $5 per annum, and all brick houses $10 per annum; or it might say that a one-story house should pay one rate and a two-story house another; or it might say that all farms must be assessed at $50 an acre, and all horses at $50 a piece.

Indeed, there is no end to the legislative vagaries that could be indulged in, if the legislature be permitted to value property for taxation. Property that it desires to protect may be favored in some such way as this. The legislature may say that moneys invested in the purchase of bonds and mortgages of individuals shall be taxed at one-half of their nominal value, and bonds and mortgages made by corporations shall be taxed at their full value or their par value.

When it is objected to the tax that it is lacking in uniformity, it is replied that the uniformity requirement of the Constitution is complied with, because there is a uniform *rule* of taxation laid down by the statute. But this is obviously mistaking words for things, and the shadow for the substance. The object is that each citizen shall contribute according to his means to the public burden. Now what are his means? Obviously the value of his property. Can it be said that A, being the owner of $100,000 of corporation bonds of the nominal value of $100,000, but really worth in the market $150,000 contributes to the support of the Government according to his means when he pays a three-mill tax upon $100,000, whilst B, owning bonds of the nominal value of $100,000, and worth in the market but $50,000, likewise pays three mills upon $100,000? Is it not entirely clear that under this uniform *rule* of taxation B is taxed just three times as much as A upon every $1,000 of actual taxable values owned by him? The argument is puerile in the extreme; and yet that such is the case is not the fault of the learned Attorney-General, but of the Legislature which has called upon him to perform the impossible task of demonstrating that black is white. Indeed, this theory that uniformity of rule satisfies the constitutional

requirement without any regard to the necessary inequalities of the public burdens which it produces, cannot possibly be sustained. It is easy to reduce the proposition to an absurdity; and, indeed, he has done so himself in the argument of this very case, by contending that the Legislature may comply with the constitutional requirement of making taxes either "uniformly *ad valorem*," or making them, as to some classes of property, "uniform specific taxes" upon an assumed analogy to license taxes! And following the same thought, the Commonwealth's officer has contended that municipal bonds may be classified for taxation as a distinct class, and, provided there is uniformity in the class, the taxation is valid, and that such is the case here.

Now observe what this leads to. The Legislature may say that the bonds given by individuals to accompany mortgages executed by them shall constitute one class, and shall be taxed directly to the mortgagor upon notice to him, and at the actual value of the security; but that corporation bonds accompanying corporation mortgages shall constitute another class, and shall be taxed to the bondowner without notice, upon an assessment made through the mortgagor, and not upon ascertainment of the real value of the security, but upon its face value. Is it not clear at a glance that this is not a classification of subjects of taxation, but, on the contrary, a mere arbitrary exaction of a specific sum of money without notice, and without regard to how unequally it apportions the public burdens upon the property in question? The object of classification is to produce uniformity, and not to destroy it; and to have regard both to this and to the convenience of the Government officials in the details by means of which the public burdens are to be ascertained and collected. And the classification must always be founded upon an essential difference in the subjects of taxation, which is not the case here, because it is just as easy to value corporation bonds as it is to value corporation stocks or the bonds of private individuals; and

a valid assessment may be provided for upon notice to the taxpayer in one case as readily as in the other.

It is true that a tax is valid notwithstanding in its practical enforcement the assessors, through mistakes of judgment, have not produced uniformity of burden. But in all these cases, the citizen had notice and an opportunity to be heard, and the tribunal which heard him, through human infirmity, made a mistake in judgment. The same thing occurs continually in ordinary judicial proceedings.

But this is a totally different thing from an inequality which does not arise from a mistake of judgment, but is the necessary consequence of a legislative requirement to tax at par, irrespective of real value, and leaving nothing to the judgment of the assessors, providing no notice to the taxpayer, and *taking his money before it reaches him.*

There is nothing but a simple legislative *fiat* directing the treasurer of the Company to "assess" the bonds at their nominal value at any time during the fiscal year.

On this point and want of "due process of law" under the Fourteenth Amendment to the Constitution of the United States, the following cases are referred to:—

Brown vs. *Hummel*, 6 Barr., 90.

Dartmouth College Case, 4 Wheaton, 581 (Webster's definition).

Stuart vs. *Palmer*, 74 New York, 191.

County of San Mateo vs. *R. R. Co.*, 13 Fed. Rep., 722.

Davidson vs. *New Orleans*, 6 Otto, 104.

Hobbs vs. *Commissioners*, N. E. Rep., Vol. 3, p. 263.

Hurtado vs. *California*, 110 U. S., 535.

In re Lake South Rep., Vol. 3, p. 479.

Strode vs. *Washer*, 16 Pacific Rep., 928.

Hutson vs. *Woodbridge*, 16 Pacific Rep., 549.

The only answer which the Supreme Court of Pennsylvania gives to the objection of want of assessment and want of notice is that neither is necessary, because the tax is a specific one, *and* that the Legislature may fix the value!

Now, in specific taxes, there are no valuations, hence there has been held to be no necessity for notice, as there is nothing to value and nothing to object to.

But, aside from the fact that there cannot be such a thing as a specific tax on corporation bonds, the statute negatives the idea that it is intended to impose a specific tax on bonds. On the contrary, the entire statute imposes taxes on property, and, in the case of bonds, goes through the form of having a valuation by providing that the Treasurer of the corporation shall make an assessment, but requires him to make it at par, and the statute allows the Treasurer a commission of five per cent. for making the assessment and deducting the tax from the interest.

In the case of *San Mateo County* vs. *The Southern Pacific Railroad*, *ut supra*, Field, J., discusses the question at great length, and in a very powerful opinion holds that inequality in taxation is a denial of "the equal protection of the laws," and is therefore within the inhibition of the Fourteenth amendment.

Field, Justice (Sawyer, Circuit Judge, concurring):—

"The concluding clause of its first section was designed to cover all cases of possible discrimination and partial legislation against any class, in ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may, indeed, be classified, and different

kinds be subjected to different rates. Real property may be taxed at one rate, and personal property at another. Property in particular cases may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions, not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule as applied to the property of individuals, where it is subject to taxation at all; and this imports that a uniform mode shall be allowed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed according to the nature or position of the property. All State action, constitutional or legislative, infringing upon the enforcement of this rule, must give way before it."

In comment on an instance similar to that suggested above, Judge Sawyer, in *County of Santa Clara* vs. *Southern Pacific R. R. Co.*, 18 Fed. Rep., 433, said:—

"A mere change of ownership, under the provision in question, largely affects the amount of taxes paid by the owner upon the same property, without any change in the character, condition, value, use or circumstances of the property itself. A provision that a black man shall pay double the amount of taxes paid by a white man on the same kind of property similarly situated and used, or upon the identical property, in consequence of a mere change of ownership from a white man to a black man, might, with as good reason, be sustained on the principle of classification invoked. The classification in this case is clearly by ownership, and not by condition or use."

In an elaborate discussion of the principles of classification in the same case, Justice Field said: "The principle

which sanctions the elimination of one element in assessing the value of property held by one party and takes it into consideration in assessing the value of property held by another, would sanction the assessment of the property of one at less than its value—at half or quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. * * * The principle which justifies such a discrimination in assessment of taxation where one of the owners is a railroad corporation and the other a natural person would also sustain it when both owners are natural persons. A mere change in the State Constitution would affect this if the Federal Constitution does not forbid it. Any difference between the owners, whether of age, color or race, or sex, which the State might designate would be a sufficient reason for the discrimination. * * * A classification of value for taxation upon any such principle would be abhorrent to all notions of equality of right among men. Strangely indeed would the law sound in case it read, that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors. * * * There undoubtedly are, and always will be, more or less, inequalities in the operation of all general legislation, arising from the different conditions of persons, from their means, business or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully-devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result."

Boundary Assessment vs. *Alabama Central R. R.*, 59 Ala., 551.

"The General Assembly cannot declare an artificial value of property."

"The Constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of property or individuals or corporations, and assess taxes on such valuations." "If the Legislature had declared that all railroads should be taxed as if the value of the road was so much per mile; or that all lands should be taxed as if they were of a particular value per acre, there would be no discussion of the question that legislative power had been transcended. What real difference is there between such an enactment and an enactment like the present—that the net earnings of a railroad shall be regarded as eight per cent. of the value of its property? Why say eight per cent? True, eight per cent. is the legal rate of interest, but is it consequently a legal standard, or a practical standard of the value of property, when such property will produce, by way of income, that sum? Property which will produce only that income will but rarely find a purchaser who will invest in it for the purpose of obtaining interest only. The rate of interest is not a standard of the value of the property, but the measure of damages fixed by law for the forbearance of a debt, the loan of money, or its detention after the date it should have been paid."

See *People* vs. *Hastings*, 29 Cal., 449.

The Legislature cannot declare an artificial value of property for taxation, such an act would be unconstitutional.

State of Nevada vs. *Estabrook*, 3 Nev., 179.

Here a section of a Revenue Act directed that a tax be levied on three-fourths of the value, previously ascertained, of the proceeds of the mine. It was held that this was unconstitutional, *the Court* saying:—"The value once being ascertained, the whole value is taxable at the same rate as all other property."

Danville vs. *Shelton*, 76 Va., 325.

While under the Virginia Constitution a city may levy a tax; it must be equal, uniform and upon an *ad valorem* basis.

An attempt, therefore, to tax those engaged in the business of purchasing leaf tobacco, fifteen cents on each one thousand pounds without regard to value is illegal.

Assess. Board vs. *Alabama Cent. R. Co.*, 59 Ala., 551.

The constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of the property of individuals or corporations, and assess taxes on such valuation.

The Code establishes a rule for the valuation of railroad property, for the purposes of taxation, which is not authorized by the Constitution, and therefore the assessment of taxes made in obedience to it is invalid, and was properly vacated by the court.

Pickard vs. *Pullman, etc., Co.*, 117 U. S., 43.

"The tax was not a property tax because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge."

People vs. *Lothrop*, 3 Colo., 456.

The power to determine the valuation of taxable property is lodged in the assessors and boards of county commissioners.

III. (*C*) The Tax is Void, because it Impairs the Corporation's Obligations to its Creditors.

The learned Attorney-General has not carefully read the case of *Murray* vs. *Charleston*, 96 U. S., 432. If he had, he would have found that this case is on all fours with the one at bar, because it was decided on the broad, general principle, without any regard to the question of non-residence of the bondholder; and, indeed, the reasoning in the case of State Tax on Foreign-held Bonds, 15 Wallace, 320, is not confined to the single question of non-residence. The cases

of *Haight* vs. *The Railroad*, 6 Wallace, page 15, and *U. S.* vs. *The Railroad Company*, 17 Wallace, 322, have no possible application to the point under discussion. Both of these cases were decided by this Court before the case of *Murray* vs. *Charleston*, and are nowhere referred to in that decision, for the obvious reason that they were not in point. The prohibition in regard to laws impairing the obligation of contracts is laid upon the States, and as these cases were under the Federal Revenue Act, no such question could arise, and no question was raised as to assessment or notice. It was simply the case of a sovereignty seizing a certain amount of money which it was in a position to get, and as to which it was not subject to the restrictions binding on the State governments. The same may be said of the case of the Savings Bank against the United States, 19 Wallace, 227 and 240.

Sinking Fund Cases, 99 U. S. Rep., 718.

Waite, C. J., speaking of the United States, says: "They "are not included within the constitutional prohibition "which prevents States from passing laws impairing the "obligations of contracts."

State Tax on Foreign-held Bonds, 15 Wallace.

The following language is to be observed on page 326: "A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State."

To return to the case of *Murray* vs. *Charleston*, 96 U. S., p. 448. The Court disclaim resting the decision on the non-residence of the bondowner.

Page 448. "We do not care now to enter upon the consideration of the question whether a State can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor or over the credit he owns. Such a discussion is

not necessary, and it may be doubtful whether the question is presented to us by this record. * * * There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts and the duty of performing them as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the greatest objects for which the Constitution was framed."

The appellant agreed with its bondholder to pay four, five or six per cent. interest.

When he comes to get his interest he is asked to be satisfied with less, because the Legislature has so willed. He is not satisfied and demands his full interest.

The Commonwealth's answer is that the tax is due from the residents, and therefore it is valid for the treasurer to deduct the amount thereof from the interest; but, aside from the fact that this argument begs the question, the Commonwealth can only tax the bonds owned by residents by an assessment against the creditors owning the bonds, and not against the debtor. This interest money, as soon as it is set apart for the payment of the bondowner, becomes and is his individual property, and *when it reaches him* then the Commonwealth may tax it; but, until it reaches him and becomes a part of his estate, it cannot be taxed to him indirectly.

Murray vs. *Charleston*, 96 U. S. Rep., p. 444.

* * * "A change of the express stipulation of a contract or a relief of a debtor from strict and literal compliance with its requirements can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State Legislature. The constitutional provision against impairing contract obligations is a

limitation upon the taxing power as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls the exercise of our supervisory power. It may then safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'you need not pay to your creditor all of what you have promised him. You may satisfy your duty to him by retaining a part for yourself or for some municipality or for the State Treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.'"

"What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the State and in subordination to it? Is it meant that when a person lends money to the State or to a municipal division of the State having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid *before* payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would 'involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax.'

"It is against the rules, both of law and of reason, to admit by implication, in the construction of a contract, a principle which goes in destruction of it. The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of their being in the undertaking of a State or city to pay a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

"Is, then, property which consists in the promise of a State or of a municipality of a State beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched; *but until payment of the debt or interest has been made as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor; namely, payment to him, without a violation of the Constitution.* 'The true rule of every case of property founded on contract with the government is this: *It must first be reduced into possession*, and then it will become subject in common with other similar property to the right of the government to raise contributions upon it. It may be said that the government may fulfil this principle by paying the interest with one hand and taking back the amount of the tax with the other. But to this the answer is that to comply truly with the rule *the tax must be upon all the money of the community*, not upon the particular portion of it which is paid to the public creditors, and it ought beside to be so regulated as *not to include a lien of the tax upon the fund.* The creditor should be not otherwise acted upon than *as every other possessor of money:* and consequently the money he receives from the public can then only be a fit subject of taxation when it is entirely separated (from the contract) and thrown undistinguished into the common mass,' 3 Hamilton Works, 514 *et seq.* Thus only can contracts with the State be allowed to have the same meaning as all other similar contracts have."

This was following *State Tax on Foreign-held Bonds*, 15 Wall, 320, in which it is said:—

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors and only possess value in

the hands of the creditors. *With them they are property and in their hands they may be taxed.* To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement.

"*The bonds* issued by the Railroad Company in this case *are* undoubtedly *property*, but property *in the hands of the holders*, not property of the obligors. * * *

"*A law which alters the terms of a contract by imposing new conditions* or dispensing with those expressed is a law which *impairs its obligation*, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract and it prevents their legal enforcement. *The Act of Pennsylvania of May* 1, 1868, *falls within this description.* It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. *It thus sanctioned and commands a disregard of the express provisions of the contracts between the Company and its creditors.* It is only one of many cases where, under the name of taxation, *an oppressive exaction is made without Constitutional warrant, amounting to little less than* an arbitrary seizure of private property."

Hartman vs. *Greenhow*, 102 U. S. Rep., page 683.

On the other hand it is urged that the bonds of every State are property in the hands of its creditors and as such that they should bear a due proportion of public burdens.

In the case of *Murray* vs. *Charleston*, 96 U. S., 432, there are many pertinent and just observations on this subject which it is not material to repeat, for the question is not material to repeat, for the question is not necessarily involved in the disposition of the case before us. Whatever may be the wise rule—looking at the necessity in a commercial country for its prosperity that its public credit should never be impaired—as to the taxibility of the public securities it is settled that any tax levied upon them cannot be withheld from the interest payable thereon. Such was the decision of this Court in *Murray* vs. *Charleston*. (Non-residence question not referred to.)

* * * "Its power of taxation must be exercised, being a political agency of the State in subordination to the inhibition of the Federal Constitution against legislation impairing the obligation of contracts. *Until the interest was paid no act of the State or of its political subdivisions exercising legislative power by its authority could work an exoneration from what was promised to the creditor.*"

* * * "Here also the coupons held by the petioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an Act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an Act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another. * * * The Act of 1876 declares that the coupons shall not be thus received for taxes and dues owing by holders of them for their full amount, but only for such portion as may remain after a tax subsequently levied upon the bonds to which they were originally attached is deducted, though the bonds

be held by other parties. * * * If against the express terms of the contract the State can take a portion of the interest in the shape of a tax on the bond, it may, at its pleasure, take the whole."

REVIEW OF SOME CITATIONS OF THE ATTORNEY-GENERAL.

Haight vs. *R. R. Co.*, 6 Wallace, 15.

Haight, a resident of New York, owned bonds of defendant from the interest on which the Company had deducted five per cent. for a federal tax which the Court held to be an income tax, payable by Haight. No question of assessment or notice was raised, nor of impairment of contract, but the only question litigated was this: Did the Company agree with Haight to pay this tax for him? The Court held that it did not.

This case is not referred to in *Murray* vs. *Charleston*.

U. S. vs. *R. R. Co.*, 17 Wallace, p. 332.

This follows *Haight* vs. *R. R. Co.*, 6 Wallace, 15, but decides that bonds of the railroad company, owned by the city of Baltimore, are not subject to federal taxation, and that consequently the United States could not recover against the Company. This case is not referred to in *Murray* vs. *Charleston*.

National Bank vs. *Commonwealth*, 6 Wallace, 353.

The tax here sustained was expressly authorized by the National Banking Act, which was in itself the charter of the bank, and consequently the shareowners took their stock with this liability written into the certificates.

Savings Bank vs. *United States*, 19 Wallace, 227.

The bank had added a certain amount in cash to its surplus, and the act of congress made it taxable at five per cent. This case simply affirms that the tax could be collected from the bank by an ordinary action of debt without an assessment.

It is to be observed, however, that the tax was on money (*Bank* vs. *U. S.*, 19 Wallace), and therefore no assessment was necessary, as it necessarily furnishes its own valuation. Besides, the bank had notice and an opportunity to be heard to contest the validity of the tax, all of which requirements are wanting in the case at bar.

Nevertheless, on page 241, a vigorous dissent by Trustees Bradley and Field is recorded, because there had been no assessment made as a foundation for the tax.

United States vs. *Ferary*, 93 U. S., p. 625.

This was the case of a tax on a distiller, rated according to the capacity of the distillery, and simply holds that the survey, until changed, is conclusive. The Court say, page 628, "and such capacity is ascertained, and information of "it is given to the distiller before he commences his manu- "facture."

King vs. *United States*, 99 U. S., p. 229.

This case affirms *Dollar Savings Bank* vs. *U. S.*, 19 Wallace, 227. The only point before the Court was this: A revenue collector had received a tax from a railroad company, which, it was claimed, had not been assessed to it, and, having failed to return it to the United States Treasury, his sureties contended that they were not liable therefor.

U. S. vs. *Erie Railway Co.*, 107 U. S., p. 1. See, also, 106 U. S., 327.

Here the company was liable to a tax of five per centum to the United States on all interest paid on its bonds, and it was held that this might be collected by suit under *Dollar Savings Bank* vs. *U. S.*, 19 Wallace, p. 700.

JAMES W. M. NEWLIN,
Attorney for Appellant.

APPENDIX.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

SUPREME COURT U.S.
October Term, 1889.
No. 1498.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

James W. M. Newlin, being duly sworn according to law deposes and says that the paper printed on the transcript of the record of this cause on page 14, and entitled "Defendant's Findings of Law," was handed by deponent to the Court of Common Pleas of Dauphin County upon the trial, together with the specifications of appeal printed on pages 4, 5 and 6 of the transcript of the record herein, which specifications of appeal were filed February 14, 1887, as appears by the docket entries, page 3, and were also formally offered in evidence on the trial (see page 11 of record). These points were simply handed up to the Court on the trial, and had not been previously filed, and it was unnecessary, according to the practice of the Court, to have said paper marked, filed by the Prothonotary. Deponent further says that it appears by the record, page 13 stenographers notes, that four appeals of the City of Chester were tried at the same time. These appeals were for different years, and the delay in trial was caused by the former

Attorney-General not being willing to try the same, notwithstanding the fact that the City of Chester wished the cases disposed of, because, under the Pennsylvania statute, if any portion of the tax is not due it bears twelve per cent. interest until payment, and the City of Chester may be required to pay, in addition thereto, a penalty of ten per cent., and a further commission of five per cent. to the Attorney-General.

Deponent further says that shortly after the writ of error was allowed herein, he requested the Attorney-General to make a motion in this court to advance the cause so that it might be heard without delay, and again in December last the Attorney-General forced to trial another appeal of the City of Chester from the same tax for another year, notwithstanding the objection then made in court, that no further cases ought to be tried until the Attorney-General had availed himself of the privilege accorded him by the Supreme Court of the United States on his application in revenue cases to advance the cause.

JAMES W. M. NEWLIN.

Sworn and subscribed before me, this 21st day of January, A. D. 1890.

JOSEPH V. GALLAGHER,
Notary Public.

[SEAL.]

Office Supreme Court U. S.
FILED.
FEB 13 1890
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

Bell's Gap Railroad Company

vs.

Commonwealth of Pennsylvania

No. 1497 OCTOBER TERM, 1889.

City of Chester

vs.

Commonwealth of Pennsylvania.

No. 1498 OCTOBER TERM, 1889.

Error to Supreme Court of Pennsylvania.

Sur motions of the Attorney General of Pennsylvania—

1. To revoke the *allocatur* and quash the writ of error.
2. To dismiss the cause.
3. To affirm the judgment below.

BRIEF on behalf of W. W. Jennings, *Plaintiff in Error*, in Jennings *vs.* Coal Ridge Improvement and Coal Co., No. 1242, October Term, 1889, in the Supreme Court of the United States.

M. E. OLMSTED,
WAYNE MACVEAGH,
Counsel for W. W. Jennings.

In the Supreme Court of the United States.

BELL'S GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA,

No. 1497, OCTOBER TERM, 1889.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA,

No. 1498, OCTOBER TERM, 1889.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

SUR MOTIONS OF ATTORNEY GENERAL OF PENNSYLVANIA.

(1) To revoke the *allocatur* and quash the writ of error.
(2) To dismiss the cause.
(3) To affirm the judgment below.

BRIEF

ON BEHALF OF W. W. JENNINGS, PLAINTIFF IN ERROR IN JENNINGS *vs.* COAL RIDGE IMPROVEMENT AND COAL COMPANY, No. 1242 OCTOBER TERM, 1889, IN THE U. S. SUPREME COURT.

In the questions raised by the Attorney General as to the records in the cases of the City of Chester and Bell's Gap Railroad Company, involved in his motion to revoke the *allocaturs* and quash the writs of error in those cases, W. W. Jennings has no interest nor concern whatever. But, in his motions to dismiss and affirm, the learned Attorney Gen-

eral, speaking of the federal questions sought to be raised in those cases, avers that, "They were so manifestly decided right, and are in themselves so frivolous, that no argument thereof is necessary." And in his brief in support of the said motions he has introduced an argument upon the questions involved in *Jennings* vs. *The Coal Ridge Improvement and Coal Company*, which argument, if sustained, will result greatly to the prejudice of the plaintiff in error in said case. The Pennsylvania statute of June 30, 1885, (P. L. 193,) in its first section declares that *all* mortgages, &c., "shall be and hereby are taxable for State purposes at the rate of three mills on every dollar of the value thereof annually." The term "value" as used in Pennsylvania taxing statutes, means *actual* value, and requires an assessment; *Commonwealth* vs. *Lehigh Valley Railroad Company, 104 Pennsylvania, 91.* Further provisions of the statute of 1885 and other laws in force provide the means of ascertaining the actual value of mortgages, &c., with notice to the owner and the right of appeal. The statutes composing the system are thus referred to by Clark, J., in *Com.* vs. *Lehigh Valley R. R. Co., 104 Pa., 100:*

"The fourth section of the act of 15th May, 1841, requires the assessors to value 'all objects of taxation, according to the *actual value thereof*, and at such rates and prices for which the same would separately *bona fide* sell.' The oath of office which is administered to the assessors, under the 9th section of the Act of 27th July, 1842, obligates that officer to value all taxable property at the rate or price which he shall, 'after due examination and consideration, believe the same would sell for, if sold singly and separately, at a *bona fide* sale, after full public notice.' The 3d section of the Act of 15th May, 1841, provides that if any assessor, or assistant assessor, shall knowingly and intentionally assess, rate, or value any property 'at more or less than he shall know and believe to be the just cash value or rate thereof, he shall be guilty of a misdemeanor, &c."

These statutes provide for notice to the owner and the right of appeal from the valuation thus made.

It is one of the facts found in the Jennings case that the

assessment of mortgages issued by individuals and of those issued by foreign corporations, when owned by residents of Pennsylvania, is at their actual value. These constitute the larger part of the mortgages within the State. But the fourth section of the statute of 1885 withdraws the mortgages issued by corporations of Pennsylvania from the general plan of assessment, and requires that, upon the payment of any interest, the treasurer of the corporation shall assess the bonds arbitrarily at their nominal or par value, and deduct the tax thereon from the interest due the bond holder; there being no provision for notice to the bond holder and no right of appeal afforded him if he had notice. This provision has given rise to a vast amount of litigation. The bond holders protested against this arbitrary valuation and taxation. Where deduction of the tax was attempted by the corporations they either accepted the reduced amount under protest or refused to accept it, and brought suit for the full amount. The Commonwealth of Pennsylvania, on the other hand, instituted claims against all of the corporations, claiming that they were responsible for the tax, whether or not they succeeded in collecting it from the bond holders.

The first case between the Commonwealth and a corporation was the one against the Delaware Division Canal Company, in which the said fourth section of the act of 1885 was declared unconstitutional by the Court of Common Pleas of Dauphin County. Upon a writ of error taken by the Commonwealth it was argued in the Supreme Court of Pennsylvania in June, 1888, the federal questions involved being fully discussed. That court (there being four judges upon the bench at that time) is understood to have been equally divided and a re-argument was ordered. Eventually the trial court was reversed and the constitutionality of the act sustained; 123 Penna., 594. In the opinion of Clark, J., in that case, no specific mention is made of the federal questions involved; but in the later case of *Lehigh Valley R. R. Co.* vs. *The Commonwealth, 25 Weekly Notes of Cases, 24,*

the same learned judge, after enumerating the several particulars in which the fourth section of the act of 1885 was alleged to violate the provisions of the federal Constitution, says:

"The opinion filed in *Commonwealth* vs. *Delaware Division Canal Company, supra,* is confined mainly to the discussion of the question of the alleged conflict of the fourth section of the act of 1885 with the Constitution of this State; but the considerations which prevailed in the discussion of that question were then, and are now, supposed to be sufficient in the main to establish its consistency with the provisions of the federal Constitution."

Through the allowance of Judge Bradley, the Delaware Division Canal Company obtained a writ of error, and that case is now before this court, being number 1092 upon the present docket for October Term, 1889. The case of *Commonwealth* vs. *Lake Shore & Michigan Southern Railway Company* was argued and decided at the same term of court, and that writ of error being allowed, stands now as No. 1154 upon the present docket of the court. Those were both cases in which the attempt was made by the State to recover the tax from the corporation.

Jennings vs. *Coal Ridge Improvement and Coal Company* is a case in which a bondholder sues for his full interest, alleging the violation of sundry provisions of the Federal Constitution by the act of 1885, under which the corporation endeavored to withhold a portion of said interest in the form of a tax. His bonds were shown to be worth not more than seventy-five cents on the dollar, and yet were required by the act to be assessed and taxed arbitrarily at their par value. The federal questions involved briefly stated were, that by reason of the arbitrary, unjust, and discriminating method of assessment provided by the fourth section of the act of 1885, Jennings was denied "the equal protection of the laws" guaranteed by section 1, of Article XIV, of the Amendments to the Federal Constitution; that deduction of the so-called

tax from the interest due him upon an excessive valuation of his bonds, of which he had no notice and from which he had no right of appeal, amounted to a deprivation of property "without due process of law," and was, therefore, for that reason also, in violation of the said fourteenth Amendment; and that by requiring the treasurer of the corporation to withhold from him a sum which, by the terms of his bonds, and the mortgage whereby they were secured, was lawfully his due, the act of 1885 impaired the obligation of the contract, and was, therefore, in conflict with section 10, of Article I, of the Constitution of the United States. As will readily appear from the opinion of the trial judge, which is printed herewith, these points were not only fairly raised, but were actually, with the exception of the one last mentioned, decided in favor of Jennings and against the constitutionality of the act. In the Supreme Court of Pennsylvania the Coal Ridge Improvement and Coal Company assigned as error the affirmance by the trial court of the points submitted by Jennings, raising the federal questions above stated. The Supreme Court of Pennsylvania entered into no discussion of the points, but sustained the assignments of error and reversed the trial court in the following *per curiam* opinion, filed June 28, 1889, (~~not reported~~): 127 Pa. 397

"The question presented by this record has been so recently considered and discussed, that any further comments are unnecessary. See cases of *Com.* vs. *Delaware Division Canal Company*; *Com.* vs. *Lake Shore and Michigan Southern Railway Company*; *Com.* vs. *City of Chester*, and *Com.* vs. *Bell's Gap Railroad Company*. These cases were so recently decided that they have not yet appeared in our State reports, but see 23, W. N. C., 216. Judgment reversed and judgment is now entered for $570 and costs."

These federal questions having been decided against the Commonwealth in two of her own courts, and having been deemed by her own Supreme Court of sufficient importance to require a second argument before final decision, are not to be considered, as urged by the Attorney General, "in them-

selves so frivolous that no argument thereof is necessary" here. They are directly involved in more than one hundred and fifty suits now pending in different Pennsylvania courts, and affect the rights of every bondholder in the State. If this court shall find that no federal questions are specified in the appeals of the City of Chester and Bell's Gap Railroad Company, Jennings has no concern with them; but if it shall be found that both or either of those cases do involve all or any of the federal questions herein mentioned, it is respectfully requested that judgment upon them shall be suspended until an opportunity shall be afforded us for full argument thereof. This request seems the more reasonable from the fact that the case of Jennings precedes upon the argument list of this court, by more than two hundred and fifty numbers, the cases in which the attack is made.

M. E. OLMSTED,
WAYNE MACVEAGH,
Attorneys for W. W. Jennings, Plaintiff in Error.

W. W. JENNINGS *vs.* THE COAL RIDGE IMPROVEMENT AND COAL COMPANY.	In the Court of Common Pleas of Northumberland County. No. 25, February T., 1888.

The act of June 30, 1885, (P. L. 193,) in its first section, enacts "that all mortgages * * shall be and are hereby taxable for State purposes at the rate of three mills on the dollar of the value thereof annually;" being but a repetition of the 17th section of the act of June 7, 1879, and the first section of the act of June 10, 1881. Having thus made all mortgages taxable, the act of 1885 leaves mortgages issued by individuals, and mortgages issued by foreign corporations not doing business in Pennsylvania, to be assessed in the hands of the holders under former general laws in relation thereto, which laws require them to be assessed "according to the actual value thereof, and at such rates and prices for which the same would separately *bona fide* sell." (See section 4, act of May 15, 1841, P. L. 394, and section 9, act of July 27, 1842, P. L. 445,) of which assessment the owner is required to be notified, and from which he is given the right of appeal. (See act of April 15, 1834, P. L. 512, section 8–16.)

But mortgages issued by corporations chartered by, or doing business in, Pennsylvania are by the fourth section of the act of 1885, required to be assessed arbitrarily at their nominal or par value, upon the payment of interest, by the treasurer of the corporation, who is commanded to deduct the tax thus assessed from the interest paid.

There are a great many mortgages owned by residents of Pennsylvania and taxable under the first section of the act, which, having been issued by foreign corporations not doing business here, are not subject to the provisions of the fourth section, and the actual value of many of them is below their nominal or par value.

The actual value of mortgages issued by corporations of Pennsylvania differs from their nominal or par value, in some cases being above, and in other cases being below the par value.

The Plaintiff, a resident of Harrisburg, Pennsylvania, owned bonds of the par value of $20,000, (but whose actual value was not greater than three fourths of their par value,) issued by defendant corporation and secured by mortgage upon part of its property. By the terms thereof, there was due as interest December 1, 1887, $600, which amount was tendered, less $30 deducted for State tax, under section 4 of the act of 1885. The tender having been refused, and suit brought for the recovery of the full amount of interest,

Held—

(1.) That the only tax to which bonds and mortgages are made subject by the act of 1885, is an annual tax upon the actual value thereof, of which

there must be a legal assessment or ascertainment, with notice to the owner and right of appeal before any tax can lawfully be due. There having been no such assessment of Plaintiff's bonds, no tax was due December 1, 1887, and the company was not authorized to withhold any portion of the interest due.

(2.) The first section of the act of 1885 provides but one class of taxable mortgages, namely, "all mortgages," but the fourth section produces a want of uniformity in the taxation of members of the same class, as in the method of assessment it discriminates between mortgages issued by corporations of Pennsylvania, which are to be assessed at their nominal value, and mortgages issued by individuals, which are to be assessed at their actual value; also between mortgages issued by corporations of Pennsylvania, which are to be assessed at their nominal value, and mortgages issued by corporations of other States but owned by residents of Pennsylvania, which are to be assessed at their actual value, and also between different mortgages issued by corporations of the State of Pennsylvania, some of which are required to be assessed above, and others below, their actual value. The fourth section is, therefore, in violation of section 1, of Article IX, of the Constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

(3.) The said fourth section, because of the arbitrary and discriminative method of assessment therein provided, without notice to, or the right of appeal on the part of, the holder of the property taxed, is also in conflict with section 1, of Article XIV, of the amendments to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(4.) For the same reason the said section is in conflict also with the provisions of Article V, of the Amendments to the Constitution of the United States, which provides that "no person shall * * * * be deprived of life, liberty or property without due process of law."

(5.) For the same reason it is also in violation of section 9, of Article I, of the Constitution of Pennsylvania, which provides that no person shall be "deprived of his life, liberty or property unless by the judgment of his peers or the law of the land."

(6) The fourth section of the act of 1885 being unconstitutional, it is, in legal contemplation, as inoperative as if it had never been passed, and afforded neither authority nor protection to the defendant corporation in deducting a tax of three mills from the interest due, and the plaintiff is entitled to recover the full amount thereof.

M. E. Olmsted for the Plaintiff.

S. P. Wolverton for the Defendant.

Hon. Wm. M. Rockefeller, President Judge of the Court of Common Pleas of

Northumberland county, being engaged in the trial of other causes, called in Hon. C. A. Mayer, President Judge of the 25th Judicial District, who heard this case, and on the 10th day of February, 1888, filed the following opinion:

This suit was instituted by W. W. Jennings against the Coal Ridge Improvement and Coal Company, to recover the sum of six hundred dollars, being the semi-annual interest due December 1st, 1887, on $20,000 of the first mortgage bonds of said corporation of the denomination of $500 each.

The case has been submitted to the court, without the intervention of a jury, under the provisions of the act of Assembly of April 22d, 1874, which requires that the decision of the court shall state separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law.

The evidence in the case appears in the depositions which have been taken, and there is practically no dispute about the facts, the questions that arise being principally legal ones.

From the evidence I find the following facts:

W. W. Jennings, the plaintiff, is a resident of Harrisburg, Pa., and was the owner on the 1st day of December, 1887, of forty first mortgage bonds, of the denomination of $500 each, making $20,000, of the Coal Ridge Improvement and Coal Company, the defendant, a corporation of the State of Pennsylvania, doing business in the county of Northumberland. By the terms of these bonds, which were registered, and the mortgage securing the same, there was due the plaintiff, on the 1st day of December, 1887, the sum of $600, being six months interest on said bonds.

The plaintiff made demand upon the company for the payment of this interest, to wit, the sum of $600, to which defendant responded by tendering to the plaintiff the sum of $570, being the interest, less the sum of $30, which the defendant claimed to deduct as a tax of three mills upon the nominal value of the bonds. This tax was deducted under the provisions of an act of Assembly approved June 30th, 1885, entitled, "A further supplement to an act entitled an act to provide revenue by taxation," approved the 7th of June, one thousand eight hundred and seventy-nine.

The only sections of this act, which are material in this controversy, are the first and fourth sections and the proviso to the sixth section, which are as follows:

"SECTION 1. *Be it enacted, &c.*, That all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, also, all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes,) and all public loans or stock whatsoever, (except those issued by this Commonwealth or the United States,) and all moneys loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of the State, shall be and are hereby taxable for State purposes at the rate of three mills on the dollar of the value thereof annually; provided that the same shall, after the passage of this act, be exempt from all taxation, except for State purposes; *Provided*, The provisions of this act shall not apply to building and loan associations."

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or the United States, and doing business in this Commonwealth, upon the payment of any interest upon any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every evidence of debt, and to report on oath, annually on the last Monday of November to the Auditor General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within fifteen days after the 21st day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation, the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

"SECTION 6. * * * * * * Provided, that the taxable persons shall not include in said return the obligations of public or private corporations, the tax upon which is required by law to be collected from the holder of such obligation and paid into the State Treasury by the corporation."

The first section of the act of June 30th, 1885, is an exact copy of the seventeenth section of the act of June 7th, 1879, and the first section of the act of June 10th, 1881, with the ex-

ception of the omission of bank shares, which are made the subject of a separate section, the second section.

Under these two sections of 1879 and 1881, it has been decided by the Supreme Court in the case of the *Commonweatth* vs. *The Lehigh R. R. Co., 8 Out. 89*, that the word "value" as used in these acts meant the actual value and not the nominal or par value of bonds and mortgages, and that a legal ascertainment of that value was essential to the assessment of a valid tax.

I find as a fact, that the actual value of the bonds of the Coal Ridge Improvement and Coal Company is not greater than three fourths of their par value, and that the interest on the bonds of said company of late years has been paid from the earnings of that portion of this company's property not covered by the mortgage.

I find also from the evidence that the actual value of corporation securities held by individuals differ from their nominal or par value. In some cases it is below and in other cases above par.

I further find that the securities issued by foreign corporations not doing business in Pennsylvania and held by residents of Pennsylvania, and those issued by individuals and owned in Pennsylvania, are assessed at their actual value.

I further find that there are a great many bonds of foreign corporations not doing business in Pennsylvania, held by residents of Pennsylvania, the actual value of many of which bonds is much below their par value.

PLAINTIFF'S POINTS AND ANSWERS OF THE COURT.

1. By the fourth section of the act of June 30th, 1885, the Defendant was authorized to deduct from interest due to Plaintiff only a tax of three mills upon said interest.

Answer of the Court: Refused.

2. The only tax to which bonds and mortgages are made subject by the act of June 30th, 1885, is an annual tax upon the actual value thereof, and before any tax can be lawfully due upon any bond or mortgage there must be a legal assessment or ascertainment of its actual value, with notice to the owner and right of appeal. There having been no such assessment of the Plaintiff's bonds, no tax was due December 1, 1887, and the Defendant company was therefore not lawfully authorized to with-

hold any portion of the interest due by the terms of the bonds and mortgages securing them.

Answer of the Court: Affirmed.

3. The first section of the act of June 30th, 1885, rendered all mortgages, bonds, &c., taxable at three mills on their actual value. Mortgages issued by individuals and mortgages issued by corporations not doing business in Pennsylvania, but owned by residents of Pennsylvania, are assessed under the general laws of the Commonwealth at their actual value, with notice to the owner of the property and the right of appeal; but, by the fourth fourth section of the act of 1885, bonds and mortgages issued by corporations of the State of Pennsylvania, including those owned by the Plaintiff, are required to be assessed arbitrarily at their nominal or par value, with no notice to the holder and no right of appeal. This discrimination in the mode of assessment of different subjects of the same class is in violation of section 1, of Article IX, of the Constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same."

Answer of the Court: Affirmed.

4. By the fourth section of the act of 1885, all bonds and mortgages issued by corporations of the State of Pennsylvania are required to be assessed and taxed arbitrarily upon their nominal value, without notice to the owner or the right of appeal. By reason of such arbitrary assessment, the mortgage bonds owned by Plaintiff, whose actual value is at least twenty-five per cent. below their nominal value, as well as all other bonds issued by corporations of Pennsylvania, and whose actual value is less than their nominal value, are required to pay the same tax as other bonds issued by corporations of Pennsylvania whose actual value is much above their nominal or par value, in some instances being nearly double the actual value of Defendant's bonds. By reason of its requiring such arbitrary assessment, the act is in conflict with section 1, Article IX, of the Constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same."

Answer of the Court: Affirmed.

5. By the first section of the act of 1885, all bonds, mortgages,

&c., owned by residents of Pennsylvania, are made taxable at three mills upon their actual value. Under the general laws of the Commonwealth all such property is to be assessed at its actual value with notice to the owner, and the right of appeal to the county commissioners, whose action is in turn reviewed by the State Board of Revenue Commissioners, except as to bonds and mortgages issued by corporations created by or doing business in Pennsylvania, which are by the provisions of the fourth section of the said act, drawn out from the general plan of assessment and required to be assessed arbitrarily at their nominal or par value. By reason of the discrimination thus made between the assessment of mortgages issued by corporations of the State of Pennsylvania, and those issued by individuals and foreign corporations, and by reason of the arbitrary assessment of bonds and mortgages issued by Pennsylvania corporations whose actual value is less than their nominal or par value as in the case of plaintiff, at the same price as other bonds issued by Pennsylvania corporations, whose actual value is much greater than their nominal or par value, the said fourth section is in conflict with section 1, Article XIV, of the amendments to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Answer of the Court: Affirmed.

6. For the reasons stated in point 5, the act of 1885, is in violation of section 9, of Article I, of the Constitution of Pennsylvania, which provides that no person shall be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Answer of the Court: Affirmed.

7. For the reasons stated in point No. 5, the act of 1885, is also in conflict with the provisions of Article V, of the amendments to the Constitution of the United States, which provides that "no person shall be * * * * deprived of life, liberty, or property, without due process of law."

Answer of the Court: Affirmed.

8. For the reasons stated in point No. 5, the act of 1885, is in conflict with section 10, of Article I, of the Constitution of Pennsylvania, which provides that private property shall not be taken or applied to public use without authority of law, and without just compensation being first made and secured.

Answer of the Court: Refused. This provision of the Constitution relates to the exercise of the right of eminent domain and is not a limitation upon the taxing power.

9. As there had been no lawful assessment of plaintiff's bonds, and no tax was thereon due to the Commonwealth of Pennsylvania upon the first day of December, 1887, the act of June 30, 1885, if it required the treasurer of the corporation, defendant, to retain or withhold any sum whatsoever, from the said interest, is void, because in conflict with section 10, of article I, of the Constitution of the United States, which forbids the States to pass any law impairing the obligation of contracts.

Answer of the Court: Refused.

Conclusions of Law.

1. The fourth section of the act of June 30, 1885, is violative of Article IX, of the Constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same." Prior to the adoption of the present Constitution, the whole matter of taxation was committed to the discretion of the Legislature. It might be levied upon such property and in such proportion as the Legislature saw fit. As was said by Woodward, C. J., in the case of *Maltby* vs. *Reading & Columbia Railroad Co.*, (*2 P. F. S., 145,*) decided in 1866, "the power of taxation, which is the corner-stone of the Government, is lodged exclusively in the Legislature, and depends wholly on the discretion of that department." But this legislative discretion no longer exists to its full extent, and its exercise is restricted by the constitutional provision which requires equality and uniformity in the imposition of the public burdens. The Constitutions of many of the States contain similar provisions enforcing this principle of equality and uniformity. In some the provision is "that taxation shall be equal and uniform throughout the State." In others, that "the Legislature shall provide a uniform

rule of taxation," or "that the rule of taxation shall be uniform.' The general principle intended to be enforced by these constitutional provisions is that taxes shall be assessed according to some rule of apportionment, so that the owners of one species of property shall pay the same amount as another owner of the same kind of property. In the Constitution of the State of Ohio, which provides for taxation by a uniform rule, the Supreme Court of that State, in construing this provision, says: "Taxation is required to be by a *uniform rule*; that is, by one and the same unvarying standard." Taxation by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as the rate of taxation. (*Exchange Bank of Columbus* vs. *Ohio*, *3 O. S. Rep.*, *1.*) In the *City of Zanesville* vs. *Richard*, from the same State, (*5 Ohio St. Rep.*, *589*,) the Supreme Court used the following language: "The General Assembly is no longer invested with the discretion to apportion the tax and to determine upon what property and in what proportion it shall be laid. A uniform rate per cent. must be levied upon all property subject to taxation according to its true valuation money, so that all may bear an equal burden."

In *Township of Pine Grove* vs. *Talcott*, (*19 Wall. U. S. Rep.*, *666*,) which was a case that arose under the Constitution of the State of Michigan, that contains a provision that "the Legisla ure shall provide a uniform rule of taxation," Justice Swayne, in speaking of this clause of the Michigan Constitution, says: "The 11th clause of the same article declares that the Legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discrimination. It prevents property from being classified and taxed as classed by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be co-extensive with the territory to which the tax applies If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout such county or city."

In *Knowlton* vs. *The Supervisors of Rock County*, (*9 Wis. Rep., 410,*) the section of the Wisconsin Constitution requiring uniformity of taxation underwent a thorough examination, and the Supreme Court of that State laid down the following propositions: "The Constitution of the State requires as a rule in levying taxes, that the valuation must be uniform and in all cases alike or equal, operating alike upon all the taxable property throughout all the territorial limits of the State or municipality within which the tax is to be raised. And where the Legislature prescribed a different rule, the act is a departure from the Constitution, and therefore void."

"The Constitution has fixed one unbending uniform rule of taxation for the State, and property cannot be classified and taxed as classed by different rules."

In the *Attorney General* vs. *The Winnebago Lake and Fox River Plank Road Company*, (*11 Wis. Rep. 42,*) the Court say, "that those who framed the Constitution of that State did provide that whatever property was made taxable *at all* should be taxed by a uniform rule, which was designed to secure equality in the burdens as between the different kinds of taxable property, but of course not as between property taxable and that not taxable."

In the case of *Gilman* vs. *City of Sheboygan*, (*2 Black, 518,*) the Supreme Court of the U. S. affirmed the soundness of the conclusions of the Supreme Court of Wisconsin in these cases.

We are aware that it is an axiom in American jurisprudence that a statute, which is said to be in conflict with the Constitution of the State, is not to be pronounced void upon this ground, unless the repugnancy to the Constitution be clear. Every doubt is to be resolved in support of the enactment. But in view of these authorities we are of the opinion that the fourth section of the act of June 30, 1885, is in conflict with Article IX of the Constitution in the following particulars:

1. As between mortgages issued by corporations of Pennsylvania, which are to be assessed at their nominal value and mortgages issued by individuals which are to be assessed at their actual value. In the former case the holder of a corporation bond secured by a mortgage, would, under the fourth section, have to pay three mills tax on the nominal value of his bond regardless of its actual value, while the holder of an individual bond, or a

bond of a foreign corporation, secured by a mortgage, would only be called on to pay three mills tax on the actual value of his bond, ascertained and determined by the machinery provided by law for that purpose. This want of equality and uniformity is apparent in the present case, which requires the holder of the bond of Defendant company to pay the three mills tax upon his bonds assessed at 100 cents on the dollar, when in fact their actual value is but 75 cents on the dollar.

2. As between mortgages issued by corporations of Pennsylvania which are to be assessed upon their nominal value, and mortgages issued by corporations of other States, but owned by residents of Pennsylvania, which are to be assessed at their actual value. The evidence in this case shows that there is a large amount of bonds of foreign corporations owned and held by residents of Pennsylvania, the actual value of which is much below their par value. But it is contended that notwithstanding the Constitutional requirement as to uniformity of taxation upon the same class of subjects, the Legislature has the power to define classes.

In support of the constitutionality of the fourth section of the act of June 30, 1885, it is contended that the classification of property for purposes of taxation, is left to the discretion of the legislative power, notwithstanding the constitutional provision as to uniformity of taxes upon the same class of subjects, and that if all the subjects in each class are taxed uniformly, the constitutional mandate is complied with. There can be no doubt of the power of the Legislature to pass acts classifying subjects for the purpose of taxation, and where such classification does not violate the constitutional provision as to uniformity, they will be sustained. The office of the constitutional provision is to deprive the Legislature of the right to arbitrarily select subjects for the purposes of taxation, and to prohibit arbitrary selection as contradistinguished from classification. To take part of a class of subjects, the whole being similarly conditioned, and subject it to a different or greater rate of taxation than is imposed on the balance of the same class, is an arbitrary exercise of the Legislative will and not a classification. The Legislature cannot, by its mere *fiat*, convert part of a class into a class. But in the present case, no classification has been attempted. The first section of the act designates the subjects of taxation and

fixes the rate, and makes no discrimination between mortgages issued by corporations and those issued by individuals, or between mortgages issued by corporations of this State, and those by corporations of another State. The only class of subjects made taxable by that section are "all mortgages." The vice of the act consists not in the classification, but in providing different methods of ascertaining the value of different subjects of the same class. Part of the same class are assessed at their actual value by the first section, and a part at their nominal value by the fourth section. But conceding that the Legislature by the fourth section had classified mortgages issued by corporations, by placing them in a separate and distinct class, the tax assessed upon their nominal value would not be uniform, for the reason that there is a great difference between the nominal and actual value of mortgages issued by corporations of the State of Pennsylvania. This will appear in the evidence taken on the part of the Plaintiff.

The fourth section of the act of 1885 is in conflict with that provision of the Constitution of Pennsylvania which declares that "no person shall be deprived of life, liberty and property unless by the judgment of his peers or the law of the land," and the Fourteenth Amendment to the Constitution of the United States, which provides that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It has been decided by the Supreme Court of the United States that corporations are persons within the intent of the clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws. *Santa Clara Co.* vs. *South Pac. Railroad, (U. S. Rep., Vol. 118, page 396.)*

It is well settled that the words "the law of the land" have the same origin and are to the same effect as "due process of law," in the bill of rights, in the Constitution of the United States, and it means judgment of law in its regular course of administration through courts of justice. *Fetter* vs. *Wilt, 46 Pa. St. Rep., 460.* It does not mean merely an act of the Legislature,

for that would abrogate all restriction or legislative power. 2 *Kent, 13*, in note.

"By due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process if it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guarantee against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the security applicable to the case recognized by the general law, by those principles which are established in all constitutional governments, for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation; and in some cases it may be given by statute, but given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so also where title or possession of property is in contention. But in the taking of property by taxation, the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of delays attendant upon judicial proceedings in courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued, when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place for hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted; and whether it takes property directly,

or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard. or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding." *County of San Mateo* vs. *Southern Pacific Railroad, Am. & Eng. R. R. cases, Vol. VIII, page 27, &c.*

In a case decided by the Court of Appeals of the State of New York, this question has been very fully and exhaustively presented. The validity of an assessment for a public street improvement was involved, and upon the decision of this question the case was determined. The validity of the law under which the assessment was made was assailed. Mr. Justice Earl, delivering the opinion of the Court, says:

"The latter assessment could be made without any notice to or hearing of any person. The law requires notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing." (*Stuart* vs. *Palmer, 74 N. Y., 186.*) The judge proceeds: "I am of the opinion that the Constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require a notice to them and give them a right to a hearing, and an opportunity to be heard. It matters not upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested not by what has been done under it, but what may by its authority be done. The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice.'

'The Legislature can no more arbitrarily impose an assessment for which property may be taken or sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life,

liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provisions that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guarantee of personal rights to be found in the Federal or State Constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature cannot do or authorize to be done. "Due process of law is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature. This great guarantee is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

"No case, it is believed, can be found in which it was decided that the constitutional guarantee did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment."

This case decides that parties are not only entitled to the notice, but that "the law must require a notice to them and give them a right to a hearing and an opportunity to be heard."

In *City of Philadelphia* vs. *Miller*, *13 Wright*, *448*, Agnew, J., said: "Notice, or at least the means of knowledge is an essential element of every just proceeding which affects the rights of persons or property."

In *Thomas* vs. *Gain*, *35 Mich.*, *155*, Cooley, C. J., after citing this case of *Philadelphia* vs. *Miller*, said: "Parties whose property is to be taken under summary tax proceedings, are entitled as of

right to be heard at some stage of the proceeding before the tax shall become an established charge against them or their property."

In *Davidson* vs. *New Orleans*, *96 U. S.*, *97*, it was assumed, and not controverted, that the party taxed must have an opportunity to be heard. "Whenever, by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The clauses of the various State constitutions prohibiting the taking of property without due process of law have frequently been held as applicable to the subject of taxation. *Philadelphia* vs. *Miller*, *49 Pa. St.*, *440*; *Commonwealth* vs. *Runk*, *26 Pa. St.*, *235*; *Darling* vs. *Yunn*, *50 Ill.*, *424*; *State* vs. *Drake*, *33 N. L. J.*, *194*; *Butler* vs. *Supervisors of Saginaw*, *26 Mich.*, *22*.

Those authorities clearly establish that where a law provides for the assessment of a tax, before the amount of the assessment is finally determined, there must be a provision in the statute for notice to the owner of the property taxed and an opportunity afforded him to interpose his objections and have a hearing. In some form he must be given the opportunity to defend his interests. The fourth section of the act of 1885 imposes an arbitrary assessment upon all bonds and mortgages issued by corporations of the State of Pennsylvania, upon their nominal value, and there is no provision made in the act for notice to the owner or the right of appeal. In my opinion, there being no provision made in the fourth section whereby the owner of such bonds and mortgages is afforded an opportunity of being heard respecting the assessment, the act is in conflict with the constitutional provision of both the State of Pennsylvania and the United States. "It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an op-

portunity of being heard against the proceeding. The principle is as old as Magna Charta, and embodied in all the State constitutions and in the Fourteenth Amendment of the Constitution."

The last question presented for our determination and which I deem the vital one, is, whether the bonds and mortgages issued by Pennsylvania corporations are subject to the same rules of assessment and taxation to which bonds and mortgages of individuals are subject, or whether the latter can be distinguished from the former, and subjected to the imposition of such different burdens in the way of taxation, as the State may elect to prescribe. The fact that corporations have issued the bonds and created the mortgages should be allowed no consideration in endeavoring to arrive at a correct conclusion. A mortgage, whether issued by a corporation or by an individual, is a mortgage. The personality of the mortgagor, whether natural or artificial, does not change the character of the instrument.

It cannot be controverted that as to all subjects within its jurisdiction the State may exercise the power of taxation, to any extent not prohibited by the Constitution of the United States. "It may touch property in every shape, in its natural condition, in its manufactured form, and its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restricted by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, when the subjects to which it applies are within her jurisdiction. Corporations may be taxed like natural persons upon their property and business." (*State Tax on Foreign Held Bonds, 15 Wall., 319.*)

The extent and scope of the Fourteenth Amendment to the Constitution of the United States has been very clearly and exaustively presented in the opinion of Field, C. J., in the case of the *County of San Mateo* vs. *Southern Pacific Railroad*, (*Am. & Eng. R. R. Cases, Vol. VIII, Page 11, &c,*) in the course of which he says: "The Fourteenth Amendment to the Constitution in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the indi-

vidual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances."

"Unequal exaction in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at one per cent., or where one may be thus taxed according to his color, because he is white, or black, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

"In the Constitution of several States a provision is found requiring 'equality and uniformity' in the taxation of property, and this is held to mean that taxes must be levied according to some fixed rate or rule of appointment, so that all persons shall pay the like amount upon similar kinds of property of the same value."

"As the foundation of all just and equal taxation is the assessment of property taxes—that is the ascertainment of its value—in order that the tax may be levied according to some ratio in the value, uniformity of taxation necessarily requires uniformity in the mode of assessment as well as in the rate of taxation; or to quote the language of the Supreme Court of Ohio expressing the same thought: 'Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation.'" *Exchange Bank of Columbus* vs. *Hines, 3 Ohio St. 1.*

"It is no answer to this discrimination to say that property

in the State may be divided into classes, and different rates prescribed for them. Undoubtedly property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation; personal property to another rate. Property in particular districts may be taxed for local purposes, while property elsewhere may be exempt. Taxation on business in the form of licenses may also vary according to the calling or occupation licensed, and the extent of business transacted, but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with the taxation of property that we are concerned in this case, and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the State for the property of railroad corporations, and the rate prescribed for the property of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value; is standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's than upon the property of individuals similarly incumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value."

I am of the opinion that by the provisions of the first and fourth sections of the act of 1885, an unlawful discrimination is made between bonds and mortgages and other evidences of debt issued by individuals and those issued by corporations of the State of Pennsylvania, to the disadvantage of holders of bond and mortgages issued by corporations of said State, by subjecting the

holders of their securities to an unequal share of the public burdens, and to that extent depriving them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This discrimination also operates unfairly to the disadvantage of Pennsylvania corporations in that it affects the market value of their securities, by imposing on them a burden of taxation greater than that imposed on similar securities issued by individuals and foreign corporations. Bonds and mortgages and evidences of debt issued by individuals and foreign corporations are subject to one rule of assessment and taxation, viz, at their actual value; while in the case of those issued by corporations of Pennsylvania another rule is prescribed, viz, their nominal value. In my judgment, such discriminative rules would be violative of the Fourteenth Amendment, which guarantees to every person or corporation the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens, under the same conditions. This departure from the rule of equality will appear, by a comparison between the scheme of taxation prescribed by the act of 1885, for bonds, mortgages and other evidences of debt issued by individuals and foreign corporations and those issued by corporations in Pennsylvania. Under the fourth section of the act of 1885, the bonds of defendant are assessed at their nominal value, to wit, 100 cents on the dollar, when in fact their actual value is but 75 cents on the dollar, while the bonds of individuals and foreign corporations not doing business in Pennsylvania are assessed at their actual value. And in many cases, as the evidence shows, the actual value of the bonds of foreign corporations is far below their nominal value. The inequality will further appear by the fact that the actual value of bonds of many of the Pennsylvania corporations exceed their nominal value.

This mode of assessment and taxation creates a discrimination with regard to the bonds and mortgages issued by Pennsylvania corporations in disregard of the rule of equality, which the first section of the Fourteenth Amendment was designed to protect. In answer to this discrimination, it is contended that for the purposes of taxation the Legislature may classify, and that it has been done so in this instance, by placing bonds, mortgages, &c., of individuals and foreign corporations in one class, and bonds, mortgages, &c., of Pennsylvania corporations in another class.

The power of classification may be conceded, but it does not follow that the mode of classification attempted in this case can be sustained. The act of 1885 prescribes the same rate of taxation for the bonds, mortages, &c., of individuals, and the bonds, mortgages, &c., of Pennsylvania corporations, viz, a three mill tax.

The discrimination complained of consists not only in the rate but in adopting a different rule for ascertaining the value of the bonds, mortgage, &c., of corporations of the State as a basis for taxation, than that prescribed for the same class of securities issued by individuals and foreign corporations. In the present case, the law requires a higher value to be placed on Defendant's securities than on the securities issued by individuals or foreign corporations similarly situated.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country, for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be enforced upon one than such as is prescribed to all for like offenses." *Barbier* vs. *Connolly, U. S. Rep., 118, page 31.*

Notwithstanding the able and ingenious argument, both oral and printed, presented by the counsel for the Defendant, in support of the constitutionality of the act of 1885, and of the imposition and collection of the tax under said act, I am unable to adopt his views, and for the reasons herein stated, my conclusion is that the fourth section of the said act of June 30, 1885, is in conflict with Section 1 of Article IX, and Section 9 of Article I

of the Constitution of Pennsylvania, and Article V, and Section 1 of Article XIV of the amendments to the Constitution of the United States. Being unconstitutional, it is void and inoperative as a law. "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as if it had never been passed." *Norton* vs. *Shelby County, 118 U. S., 442.* The Defendant was, consequently, not authorized or protected by said act, in deducting a tax of three mills from the nominal value of Plaintiff's bonds, and Plaintiff is entitled to recover full amount of his claim, to wit, the sum of $600. And judgment must be accordingly entered in favor of the Plaintiff and against the Defendant for the sum of $600, in accordance with the provisions of the second section of the act of April 22d, 1874.

Office Supreme Court U. S.
FILED.
FEB 13 1890
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

Bell's Gap Railroad Company

vs.

Commonwealth of Pennsylvania

No. 1497 OCTOBER TERM, 1889.

City of Chester

vs.

Commonwealth of Pennsylvania.

No. 1498 OCTOBER TERM, 1889.

Error to Supreme Court of Pennsylvania.

In the matter of the motions and briefs on behalf of the Commonwealth of Pennsylvania, in which it is sought—

1. To revoke the *allocatur* and dismiss the writ of error.
2. To dismiss the cause.
3. To affirm the judgment below.

BRIEF OF ARGUMENT

On behalf of the

Delaware Division Canal Co.
Lake Shore & Michigan Southern R'y Co.
New York, Lake Erie & Western R. R. Co.
Clearfield Bituminous Coal Corporation.
Delaware, Lackawanna & Western R. R. Co.
Lehigh Valley R. R. Co.

by

M. E. OLMSTED,
Of Counsel.

In the Supreme Court of the United States.

BELL'S GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA,

No. 1497, OCTOBER TERM, 1889.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA,

No. 1498, OCTOBER TERM, 1889.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

In the matter of the motions and briefs on behalf of the Commonwealth of Pennsylvania, in which it is sought—

(1) To revoke the *allocatur* and quash the writ of error.

(2) To dismiss the cause.

(3) To affirm the judgment below.

BRIEF OF ARGUMENT

ON BEHALF OF THE DELAWARE DIVISION CANAL COMPANY, LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, CLEARFIELD BITUMINOUS COAL CORPORATION, DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY.

The corporations on whose behalf this brief is submitted are, all of them, plaintiffs in error in suits pending in this court, involving the constitutionality of the fourth section of the Pennsylvania statute of June 30, 1885, (P. L. 193.) The cases of the Delaware Division Canal Company and

Lake Shore & Michigan Southern Railway Company are numbered respectively 1092 and 1154 upon the present trial list, for October Term, 1889. Writs have been allowed in the cases of the other companies, and they either have been docketed or will be as speedily as the prothonotary of the Supreme Court of Pennsylvania can prepare the records.

These corporations have no interest in the motions filed by the learned Attorney General of Pennsylvania in the cases of the Bell's Gap Railroad Company and City of Chester, to revoke the *allocaturs* and quash the writs of error. But they are interested in his motions to dismiss and affirm.

Their cases, like those of the Bell's Gap Railroad Company and City of Chester, are founded upon appeals by the corporations from accounts settled by the Auditor General and State Treasurer of Pennsylvania, and, like them, they were heard by the trial court without the intervention of a jury, the court finding both the law and the facts. The argument of the learned Attorney General on page 7 of his brief, that in cases so tried the record consists solely of the findings of fact by the court, its answers to such points as may be submitted, and its conclusions of law, is incorrect and misleading as to cases tried upon appeal from accounts settled by the Auditor General and State Treasurer. *Miller* v. *Dunlap*, which he cites, was not such a case, and is, therefore, not authority for such a case. From such accounts the appeal is filed under the authority of section 11 of the act of March 30, 1811, which reads as follows:

"If any person or persons, body politic, or corporate, be dissatisfied with the settlement of his, her, or their account by the Auditor General and State Treasurer, he, she, or they may appeal therefrom to the Court of Common Pleas of the county in which the seat of government shall then be, and such appeal shall be transmitted by the Auditor General to the clerk of the said court, to be by him entered of record, subject to like proceedings, under the directions of the State Treasurer, as in common suits: *Provided, however*, That the appeal be filed in the office of the Auditor General within sixty days after notice of such settlement, and be accompanied with a speci-

fication of objections to the said settlement; and that the person or party appealing shall enter sufficient security before one of the judges of the Court of Common Pleas, within ten days next after such appeal, to prosecute such appeal with effect, and to pay all costs and charges which the court or arbitrators shall award, and also pay any sum of money which shall appear, by the judgment of the said court or award of arbitrators, to be due by him, her, or them to the Commonwealth: *Provided, nevertheless,* That where any proceedings shall be had against any person or persons, who, upon summons and demand made, in pursuance of this act, shall have refused or neglected to exhibit his, her, or their account to the Auditor General, as by this act is directed, such person or persons shall not be allowed any appeal from the settlement of the accountant officers, but the same shall be final."

For the purpose of emphasizing some of the specifications of objection contained in the appeal, points are sometimes submitted, but more frequently they are not, and in any event a point could not be considered by the Court unless covered by the specifications of objections found in the appeal, for, as has over and over again been decided, the corporation is limited to the defenses specified and set forth in its appeal, and can raise no other. It is customary for the Attorney General to file a formal declaration accompanied by a copy of the account. Sometimes a plea is entered by defendant, but more frequently it is not. The case is at issue and is always tried upon the account and the appeal. The corporation can get its objections upon the record only by way of the appeal, and the appeal constitutes the record. For the purpose of showing what questions are involved, the appeal is the only record.

In *Delaware, &c., Railroad Company* vs. *Commonwealth, 66 Penna., 64,* it was distinctly declared by the Supreme Court of Pennsylvania, as stated in the syllabus, that "On an appeal from a settlement of the accounting officers of the Commonwealth no point can be reviewed unless specified in taking the appeal." In beginning the opinion of the Court, Thompson, C. J., on page 67, said:

"In *Porter* vs. *The Commonwealth, 1 Penna., R. 281,* it was

explicitly resolved that no point was examinable on the trial of an appeal from the settlement of an account in the Auditor General's office by the appellate court, nor reviewable in this court, unless it had been specified as a ground of objection to the settlement on taking the appeal. This is an express provision of the act of 30th March, 1811."

In that case the appeal specified certain objections and certain additional points were raised in the trial court. Having disposed of those specified in the appeal, the learned Chief Justice continued thus:

"None of the remaining questions are raised in the specifications of objections filed, and are not, therefore, here for adjudication. The point urged that the company was not required to retain, but only its officers, is not hinted at in the specifications of objections. * * * This must have been an after-thought, but after-thoughts are not allowable by the act of 1811."

On page 70, referring to the claim of the corporation that it was not subject to an increased rate of interest, he says: "This was not made an objection to the settlement when the appeal was taken, and on the principles stated in the outset of this opinion, is not now a question for examination." To the same affect was the decision of the same Court in *Commonwealth* vs. *Porter, 21 Penna., 385; Hayes* vs. *Commonwealth, 27 Penna., 272.*

In *Commonwealth* vs. *Honeybrook Coal Company, 2 Pearson, 365,* the venerable Judge Pearson, who for more than thirty years presided over the Court of Common Pleas of Dauphin County, in which all appeals, under the act of 1811, are heard, said:

"It is an undoubted rule that in appeals from the decisions of the accounting department specifications of the objections must be taken at the time and filed with the appeal, and the party appellant is confined to the matter specified."

The first case heard in the trial court involving the fourth section of the act of 1885 was that of the Delaware Division Canal Company, in which the principal opinion was written.

The next was that of the Lake Shore & Michigan Southern Railway Co. Then followed the cases of the City of Chester and the Bell's Gap Railroad Co. The evidence and findings of fact by the court upon which the statute was declared unconstitutional by the trial court, and upon which it is confidently expected that this Court will reach the same conclusion, are found in the records of the Delaware Division Canal and Lake Shore cases, but do not appear in the records of the City of Chester and Bell's Gap cases. In each of those cases the trial court decided against the constitutionality of the act. In the case of the Delaware Division Canal Co. the opinion filed did not specifically discuss the federal questions raised in the appeal, but deemed it sufficient to declare the act invalid because in conflict with certain somewhat similar provisions of the State Constitution. In taking the case to the Supreme Court of Pennsylvania, the attorney-general assigned as error the finding of the court upon the questions discussed by it. As the judgment was in favor of the corporation, there was no occasion for *it* to enter any exceptions to the ruling of the trial court. Its claims under the federal Constitution being already of record in its appeal, there was no need to further specify them. They went up to the Supreme Court of Pennsylvania with, and as part of, the record, and were there fully discussed, both orally and in the printed briefs of either side. The questions being squarely raised in the appeal, no judgment could be entered against the corporation except in denial of the rights, privileges, and immunities thus claimed under the Federal Constitution. The Supreme Court of Pennsylvania, reversing the trial court, did enter judgment for a specific sum in each of the four cases, the principal opinion being again written in the case of the Delaware Division Canal Company. Mr. Justice Clark, who delivered it, did not therein separately discuss the federal questions involved, probably because the provisions of the State and Federal Constitutions were so similar that no separate dis-

cussion was deemed necessary. But the subsequent case of *Coal Ridge Improvement & Coal Company* v. *Jennings*, was a suit between a bond holder and a corporation, involving the constitutionality of the same statute. Not arising under the act of 1811, it was not tried upon appeal, but the federal questions were presented in the form of points submitted to and passed upon by the trial judge. He distinctly *affirmed* points denying the constitutionality of the act. Exceptions to his ruling upon these points were filed by the corporation, but overruled, and the overruling of the exceptions was assigned as error when the case appeared in the Supreme Court of Pennsylvania, where it was disposed of in the following *per curiam* opinion filed, June 28, 1889: (Not reported.) 127 Pa. 377

"The question presented by this record has been so recently considered and discussed, that any further comments are unnecessary. See cases of *Com.* vs. *Delaware Division Canal Company; Com.* vs. *Lake Shore and Michigan Southern Railway Company; Com.* vs. *City of Chester*, and *Com.* vs. *Bell's Gap Railroad Company*. These cases were so recently decided that they have not yet appeared in our State reports, but see *23 W. N. C., 216*. Judgment reversed and judgment is now entered for $570 and costs."

In the still later case of *Com.* vs. *Lehigh Valley Railroad Co., 25 Weekly Notes of Cases, 24*, Mr. Justice Clark, who again delivered the opinion of the Supreme Court, said:

"The company's contention is:

"I. That the fourth section of the act of 1885 is repugnant to section 1, of Article IX, of the Constitution of this State, which provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and that they shall be levied and collected under general laws.

II. That the provisions of the act of 1885 are in conflict with the Constitution of the United States, as follows: First, with section 10, of Article I, which forbids the passage of any law impairing the obligations of a contract; second, with Article V, of the Amendments, which provides that no person shall be deprived of his property without due process of law; and third, with section 1, of Article XIV, which provides that no State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

III. That in any event the company is not liable for the tax upon its bonds, excepting for that proportion of a year's tax, which accrued between December 31, 1885, and the date at which the last payment of interest was due and payable upon the bonds, within the year ending first Monday of November, 1886.

"As the matters involved in the first and second questions presented were fully discussed and decided in the very recent case of the *Commonwealth* v. *Delaware Division Canal Co.* (*123 Pa., 494,*) it is not necessary now to enter upon any further discussion of them. We are well satisfied that the case referred to was rightly decided; and as this case in this respect is identical in principle, it would be useless to repeat the reasons there assigned for the judgment entered. The opinion filed in *Commonwealth* vs. *Delaware Division Canal Co.*, *supra*, is confined mainly to discussion of the question of the alleged conflict of the fourth section of the act of 1885 with the Constitution of this State, but the same considerations which prevailed in the discussion of that question were then, and are now, supposed to be sufficient in the main to establish its consistency with the provisions of the Federal Constitution."

The cases of the Lehigh Valley Railroad Company, New York, Lake Erie and Western Railroad Company, Delaware, Lackawanna and Western Railroad Company, and Clearfield Bituminous Coal Corporation, were not finally decided in the trial court until after the decision of the Supreme Court in the Delaware Division Canal Company's case sustaining the constitutionality of the tax. In these cases, therefore, the trial court, following the decision of the Supreme Court, decided against the corporations upon those specifications in their appeals raising federal questions as well as those raising questions under the State Constitution. Its rulings were made the subject of exceptions and of assignments of error, in which form they were presented to the Supreme Court, with result as stated in *Commonwealth* vs. *Lehigh Valley R. R. Co.*, *supra*.

Even upon the theory of the learned Attorney General the federal questions were properly raised in these cases, but had

they been set forth in the appeals alone it would have been sufficient. The appeal is the plea of the corporation. It is the paper which the law requires it to place upon record as embodying specifically its objections to the claim of the Commonwealth. Upon that appeal it must stand or fall No defense not covered by its provisions can afterwards be set up, but upon everything therein contained it is entitled to a decision. Each of the appeals of the corporations on whose behalf this brief is filed, specifically raises the follow-lowing federal questions:

1. That in compelling corporations to act as collectors and become responsible for the taxes imposed by law upon their share-holders or other creditors. the statute of 1885 imposes burdens not found in their charter contracts, and therefore impairs the obligation thereof, in violation of clause 1 of section X of article 1 of the Constitution of the United States.

2. That in requiring them to withhold from their creditors a portion of the interest which they have agreed to pay, the statute impairs the obligation of the contract between them and their creditors.

3. That by reason of its discriminative methods of assessment, the statute denies to the persons taxed (the bondholders) "the equal protection of the laws," and therefore violates the fourteenth Amendment to the Constitution of the United States.

4. That by affording to the owner of the property taxed no notice of its valuation and no right of appeal, the imposition of the tax under the statute amounts to a deprivation of property without "due process of law," and is, for that reason, also, in violation of said constitutional amendment.

Some of the cases involve still further federal questions. But the four mentioned are common to all. Instead of being, as said by the learned Attorney General, so frivolous as not to require argument here, they are so important and substantial that except as to the first one, they have been decided against the Commonwealth in two of her own courts.

They affect the rights and the interest of every corporation and every owner of corporate bonds in the State of Pennsylvania.

The first section of the Pennsylvania statute of June 30, 1885, (P. L. 193,) enacts that all mortgages, notes, bonds, &c., "shall be and are hereby taxable for State purposes at the the rate of three mills on the dollar of the value thereof annually." The term "value" as thus used, implies *actual* value, and requires an ascertainment thereof by some legal process of assessment; *Com.* vs. *Lehigh Valley R. R. Co., 104 Pa., 89.* The great mass of mortgages, including those issued by individuals and those issued by foreign corporations are, when held in Pennsylvania, assessed and taxed, under the general laws in relation thereto, in the hands of the holders, at the actual value for which they would separately *bona fide* sell; it being made by statute a misdemeanor for the assessors to assess them otherwise. For a discussion of this system and the statutes under which the assessments are made, see page 91, in *Com.* vs. *Lehigh Valley R. R. Co., supra.* The fourth section of the statue of 1885 provides a different method for the assessment of mortgages, &c., issued by corporations of the State of Pennsylvania, or by foreign corporations doing business in Pennsylvania, the treasurers of which, upon the payment of any interest, are required to assess the tax upon the nominal value of the bond or mortgage and deduct the same from the interest. The case of the Delaware Division Canal Company having been tried without a jury, the trial Judge found the following facts, which, as shown in the brief of the learned Attorney General, have the affect of the verdict of a jury, and cannot be impeached:

"4. The nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value which is often either above or below their par value; the actual value being dependent upon the value of the property mortgaged, the rate of interest, the date of maturity, and other conditions, some bonds upon which interest is regularly paid selling as low as fifty cents on the dollar, and others as high as one hundred and fifty. The actual and par values of mortgages issued by individuals

agree more nearly than those of mortgages issued by corporations.

"5. There are owned by residents of Pennsylvania large amounts of bonds and mortgages issued by foreign corporations not doing business in this State, and not subject to the provisions of the 4th section of the act of June 30, 1885, but taxable at their actual value under the 1st section, the actual value of some of which bonds is much above, and others much below, their nominal or par value."

From these facts it readily appears that the fourth section of the act requiring some of them to be assessed at their nominal value, results in great discrimination, and gross inequality in the taxation of the mortgages upon which the tax is imposed by the first section. Mortgages issued by individuals are all assessed and taxed at their actual value whether it be above or below par. So are those issued by foreign corporations not doing business in Pennsylvania. The bonds of the Texas & Pacific Railway Company, for instance, worth 75 cents on the dollar, are assessed and taxed at that figure, that corporation not being engaged in business in the State; but those issued by the New York, Lake Erie & Western Railroad Company also a foreign corporation, but doing business in Pennsylvania, although worth no more, are taxed under the fourth section at their nominal value or 33⅓ per cent. higher than the Texas Pacific bonds. A bond issued by a Pennsylvania corporation, although worth only seventy-five cents on the dollar, is assessed and taxed at the same figure as a bond worth fifty per cent. premium. The mortgages of the New York, Lake Erie and Western Railroad Company, one of the parties concerned herein, are of fifteen different varieties, and it is found as a fact by the trial court that the bonds secured by them range in value from twenty-five per cent. below, to forty per cent above par; yet the Commonwealth strives to tax them all at par, the excessive taxation of the lower-priced bonds being made to balance to undervaluation of those which sell at a premium. It is from such unjust and arbitrary exactions that the protection of the Federal Constitution is invoked.

To the suggestion found on page 10, of the learned Attorney General's brief in the Bell's Gap case, that the corporations, being only collectors of the tax, have no standing to test the validity of the statute, it is sufficient to oppose the language of Mr. Justice Clark, in *Commth.* vs. *Delaware Division Canal Co., 123 Pa., 594,* who, in the concluding paragraph of his opinion, says:

> "That the defendants have a legal standing to contest the constitutionality of the law, and the validity of the settlement we have no doubt; if the tax were illegal the company would have been under no obligations to retain it or to pay it to the State."

It must be borne in mind that these corporations have not deducted any tax from the interest paid their bondholders. These suits are brought to make the companies themselves pay the sums it is alleged they should have deducted.

The position of the corporations is most embarrassing. The State, holding them responsible for the full amount of the tax whether deducted by them or not, has brought hundreds of suits against them, while, upon the other hand, the bondholders, denying the constitutionality of the statute, either accept the reduced amount of interest under protest, or refuse to accept it at all, and bring suit for the full amount. Until a final decision by this Court upon the merits of the case the utmost confusion must necessarily exist. If the appeal filed by either the City of Chester or the Bell's Gap R. R. Co. raises all or any of the federal questions above suggested, they are properly upon the second whether or not any further points were submitted in the trial Court. Had the Attorney General been anxious to meet the main question upon its merits his obvious course would have been to proceed against the Delaware Division Canal Co., whose case is No. 1092, or four hundred and six numbers earlier on the list than that of the Bell's Gap R. R. Co., or the Lake Shore and Michigan Southern Railway Co., whose case is No. 1154.

As already stated, the evidence and the findings of fact by the trial court, upon which this court is expected to over-

throw the statute of 1885, are much fuller and more complete in the two earlier cases than in the ones upon which the attack has been made. It would be manifestly unjust that a decision should be had upon the main questions involved without a full opportunity to be heard afforded to all the the corporations on whose behalf this brief is filed, and particularly to those who bore the burden of the fight in the Pennsylvania courts, and whose cases, by reason of priority upon the docket, are entitled to be first heard here.

The records of these cases, some of which are exceedingly voluminous, will be ordered printed as rapidly as possible. The corporations herein named will be quite ready to co-operate with the learned Attorney General in any movement looking to an early oral argument of their respective cases either upon the question of jurisdiction or upon the main questions involved, and they are quite ready and willing to submit to any order of the court in relation thereto; but they do most earnestly request that no decision shall be made upon any of the points affecting their interests as herein set forth until they may have an opportunity of being heard thereon,

M. E. OLMSTED,
Attorney for
Delaware Division Canal Co.
Lake Shore & Michigan Southern R'y Co.
New York, Lake Erie & Western R. R. Co.
Clearfield Bituminous Coal Corporation.
Delaware, Lackawanna & Western R. R. Co.
Lehigh Valley R. R. Co.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

No. 170, SEPTEMBER TERM, 1887.

Commonwealth of Pennsylvania

vs.

Delaware Division Canal Company.

Taxation of Corporate Loans.

OPINION OF THE COURT.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

NO. 170 SEPTEMBER TERM, 1887.

COMMONWEALTH OF PENNSYLVANIA

vs.

DELAWARE DIVISION CANAL COMPANY.

Section 1 of the Revenue Act of 1885, (P. L. 193,) declares that "*all* mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment * * * and all other monied capital in the hands of individual citizens of the State, shall be, and are hereby taxable for State purposes at the rate of three mills on the dollar of the value thereof annually." Mortgages issued by individuals, and those issued by corporations not doing business in this State, are, when held by citizens of the State, to be returned to the local assessors, who are, by the act of 1841, required to assess and tax them "according to the actual value thereof, and at such rates and prices for which the same would separately *bona fide* sell." But mortgages issued by corporations doing business in Pennsylvania are required to be assessed and taxed by the treasurers thereof upon their nominal or par value, the tax to be deducted from the interest paid to the holder of the bond or mortgage, it appearing from the evidence that the nominal or par value of corporate loans is no certain measure of their actual value, which is sometimes much higher and sometimes much lower, some interest-bearing bonds selling as low as fifty cents on the dollar, and others as high as one hundred and fifty.

Held, Upon the authority of *Com.* vs. *Lehigh Valley R. R. Co., 104 Pa., 89*, that the tax imposed by section 1 of the act of 1885 of "three mills on the dollar of the value" of the taxable subjects is a tax upon the actual cash value thereof.

Questioned, Whether an assessment of the tax upon the par or nominal value is such an application of the rate to the value of the property as would amount to a valid tax, such an assessment not being the result of the exercise of the judgment of the person making it, but merely an arithmetical calculation made in obedience to the mandate of the law. But even assuming such an assessment valid,

Held, That if all mortgages, &c., including corporate loans, are, by the act of 1885, embraced in the same class of subjects, section four of the act, inasmuch as it results in a discrimination between mortgages issued by corporations doing business in this State, and those issued by individuals or by corporations not doing business in this State, but owned by citizens of the State, is in violation of that clause of the State Constitution which requires that "all taxes shall be uniform

upon the same class of subjects within the territorial limits of the authority levying the tax."

Held, That, treating corporate loans as a class by themselves, the same want of uniformity exists; those issued by foreign corporations, of which large amounts are owned in this State, being taxable at their actual cash value, as fixed by the local assessors, while those issued by corporations doing business in Pennsylvania are to be assessed at their nominal or par value.

Held, That even treating the loans of corporations doing business in Pennsylvania, and covered by section four, as a distinct class by themselves, the same lack of uniformity exists as under the facts, the necessary working of the law is such that the owner of these loans, to the value of $10,000, may pay a less amount of tax than another whose holdings are only worth $5,000. Therefore,

Held, That the act cannot be construed in harmony with the constitutional mandate as to uniformity of taxes by adopting any possible system of classification, and it is, therefore, as to section four, unconstitutional and void.

There was offered the testimony of several prominent bankers and brokers, all of whom testified that the par value of corporate loans is not, in commercial transactions, considered as any reliable criterion of their actual value, which depends upon various conditions, such as the value of the property mortgaged, its earning capacity, the rate of interest, &c. Also the records of the New York and Philadelphia Stock Exchanges showing sales of all the bonds there listed, very few of which sales were at par, and many of which were above and many others much below par, it frequently happening that in the case of a single company its various loans differed materially in actual values, as for instance, the New York, Lake Erie and Western Railroad Co. having fifteen different loans, varying in value from 75 to 140, and the Philadelphia & Reading R. R. Co.'s numerous loans, selling variously from 14 to 127.

JNO. F. SANDERSON, *Deputy Attorney General*, and W. S. KIRKPATRICK, *Attorney General, for the Commonwealth.*

M. E. OLMSTED, *for Defendant.*

The following opinion was filed April 23, 1888:

By the Court:

This case was tried by the Court as provided by the Act of April 22, 1874.

It originated in an account settled May 20, 1887, by the Auditor General and State Treasurer against defendant for "tax on

scrip, bonds, and certificates of indebtedness," from which settlement defendant entered an appeal to this Court, as authorized by the Act of 1811, relative to public accounts.

We find from the evidence the following facts:

1. The Delaware Division Canal Company, defendant, is a corporation of the State of Pennsylvania, chartered in 1858, and having authority to borrow money, issue bonds, and secure the same by mortgage.

2. In pursuance of this authority, defendant has issued bonds secured by mortgage to the amount of $800,000, all of which were outstanding during the year ending with the first Monday of November, 1886, and were held as follows:

By non-residents of Pennsylvania, ...	$100,000 00
By residents of Pennsylvania, ...	285,000 00
By the Lehigh Coal and Navigation Company, a corporation of the State of Pennsylvania, ...	306,000 00
By other corporations of the State of Pennsylvania,	109,000 00

3. No interest was paid upon the $306,000 of bonds held by the Lehigh Coal and Navigation Company, nor was any due or payable. By the terms of an agreement of lease between the two companies, those bonds are not to bear interest until the termination of the lease. Upon the remaining $494,000 of bonds interest was paid upon the first days of January and July, but the company, denying the validity of the 4th section of the Act of 1885, did not deduct and pay into the State Treasury the State tax of three mills, as required by said section.

4. The nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value which is often either above or below their par value; the actual value being dependent upon the value of the property mortgaged, the rate of interest, the date of maturity, and other conditions, some bonds upon which interest is regularly paid selling as low as fifty cents on the dollar, and others as high as one hundred and fifty. The actual and par values of mortgages issued by individuals agree more nearly than those of mortgages issued by corporations.

5. There are owned by residents of Pennsylvania large amounts of bonds and mortgages issued by foreign corporations not doing business in this State, and not subject to the provisions of the 4th

section of the act of June 30, 1885, but taxable at their actual value under the 1st section, the actual value of some of which bonds is much above, and others much below, their nominal or par value.

6. The settlement appealed from is, as stated therein, based upon section 4 of the act of June 30, 1885, (P. L. 193.) Tax is charged therein upon all the bonds of the company defendant except the one hundred thousand held by non-residents of the State.

We think a brief history of prior legislation, similar to that now before us, and of judicial decision thereon, will aid us to understand and determine the questions involved in this case.

The act of June 30, 1885, on which the settlement of account and claim for taxes in this case is based, is a second supplement to the act of June 7, 1879, entitled "An act to provide revenue by taxation," the first supplement being the act of June 10, 1881. The taxing sections of these three acts are substantially identical, and are in effect the same as the taxing section of the act of April 29, 1844. They all tax, among other things, "mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment;" the acts of 1844 and 1885, at the rate of three mills on every dollar of the value thereof; and the act of 1879 and 1881 at four mills.

Under the act of 1844, and other tax laws in force, the tax on the mortgages and evidences of indebtedness of railroads and other private corporations, which we shall hereafter in this opinion style corporate loans, was levied, assessed and collected by the same officers, process and machinery as other State and county rates and levies. The several assessors were required to value them as all other objects of taxation, "according to the actual value thereof, and at such rates and prices for which the same would separately *bona fide* sell." (Act May 5, 1841, P. L. —.)

An attempt was made by the act of 1879, to change the mode of levying the tax on corporate loans. After exempting them from taxation, except for State purposes, it enacted that "All corporations paying interest on loans hereby taxed for State purposes only, shall deduct the said tax from the said interest and pay the same into the State Treasury."

To this provision was added, in section 2 of the act of 1881, a clause requiring the corporations to report annually in the month of November, the amount of indebtedness upon which they had paid interest.

Accounts having been settled against numerous corporations, under these acts, for tax on corporate loans for the years 1880 and 1881, appeals were taken by the corporations to this Court, when it was contended on their behalf that as there was no means of assessment provided by the acts, it was still the duty of the local assessors, in making the assessment for the years in question to value and assess corporate loans with the other subjects of taxation in the hands of their owners. That in discharge of this duty the assessors, acting as officers of the Commonwealth, had made such assessments and had made due and proper returns thereof, which had been accepted and acted upon by the revenue officers of the State, and, therefore, it must be assumed that they had performed their whole duty in the premises, and that their returns were full and true, not only as to all classes of subjects, but also all objects taxable is said classes, including these loans, and that, therefore, the tax upon them must be presumed to have been collected by the ordinary mode of collecting State and county taxes.

This Court found the facts to be as claimed, and decided that the necessary conclusion of law was that the tax had been paid and therefore entered judgment for defendants, and on writ of error to the Supreme Court this judgment was affirmed. (*Commonwealth* vs. *Lehigh Valley R. R. Co., 104 Pa. St., 89,*) decided October 2, 1883.

Thereupon, at the next session of the Legislature, the act of June 30, 1885, was passed, as a further supplement to the act of 1879. In it no change was made in the subjects of taxation, but the rate is changed from four mills to "three mills on the dollar of the value" of the taxable subjects annually. And in section 4 it is made the duty of the treasurer of each private corporation, on the payment of interest on its indebtedness to residents of the State, "to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt," while section 6 provides that corporate loans and indebtedness shall not be returned to, nor assessed by, the local assessor.

Accounts having been settled against numerous corporations under section 4 of this act, appeals have been taken, and one of these is now before us.

It is obvious that the defense set up in the case above referred to, cannot be interposed in this, for as we have seen section 6 of the act withdraws corporate loans from the jurisdiction of the local assessors, and there can therefore be no presumption that they have been assessed in any other mode than that prescribed by section 4 of the act of 1885.

But the defendants contend that the settlement now in question is illegal and invalid because (among other reasons) section 4 is repugnant to the clause of the Constitution of 1874, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The argument is that the taxing section of the act subjects all the taxable subjects therein designated, including corporate loans, to a tax of three mills on the dollar of their value; that all the other subjects are valued and taxed according to such value by the local assessors, while corporate loans are, without being valued and assessed, taxed at their nominal value. And it is averred, and we have found as one of the facts in the case, that their nominal value is no certain measure of their actual value, which is often much greater, and often much less; so that in many instances the tax is much more, and in many others much less, than it would be if imposed upon the actual value of each several taxable subject.

To appreciate correctly the force of this argument, we must understand clearly the nature of the tax in question. This we can readily do from the decision in the case referred to above. It is there demonstrated that it is a tax on property, and that when this property is made taxable at three mills on the dollar of its value, its actual cash value is intended.

But, if it is a tax on property, it cannot be levied without an assessment. And if the property is taxable at a given rate upon its actual cash value, the assessment must include a valuation.

A valuation "is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation." (Mr. Justice Miller in *People* vs. *Weaver, 100 U. S., 545.*

"Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are nullities." (Cooley, Const. Lim., 259.) "The tax of a citizen is the result of the rate applied to the value of the property which he owns, and he is not taxed until the rate is thus applied by some legal mode of adjustment, no duty of payment arises, no proceeding to collect can be sustained until the tax is thus created." (*Commonwealth* vs. *Lehigh Valley R. R. Co.*, *supra p. 101*, per Clark, J.)

It was no doubt the judgment in this case which led to the insertion in the act of 1885, which, as we have seen, is a supplement to the act of 1879, then before the court, of the provision in section 4, making it the duty of the treasurer of corporations, on the payment of interest to residents of the Commonwealth, "to assess the tax imposed and provided for State purposes"—which is the tax imposed by section 1 of the act—upon the nominal value "of the corporate loan."

Bearing in mind that the tax in question here is by the express terms of the act imposing it, a tax of "three mills on the dollar of the value" of the taxable subjects, and that this means actual cash value, it might well be questioned whether an assessment of the tax "upon the nominal value of each and every said evidence of debt," is such an application of the rate to the value of the property, as would amount to a valid tax, especially when such assessment is not in any respect the result of the exercise of the judgment of the person making it, but merely an arithmetical calculation made in obedience to the mandate of the law.

But let us, for the sake of the argument, assume that the assessment prescribed in section 4, is, so far as the principle of the valuation is concerned, a valid assessment. We have then this state of affairs: All mortgages and loans are, by section 1 of the act, taxable at the rate of three mills on the dollar of their actual cash value, and all of them, except corporate mortgages and loans, are in practice so taxed; while corporate mortgages and loans, which are undoubtedly embraced in the general terms, 'all mortgages and loans,' are in practice taxed at the rate of three mills on their nominal value, which often differs by one

hundred per centum from their actual value, so that the tax is in many cases double, and in others not more than one half the amount it would be if the tax were upon the actual value; with the result that of two persons owning taxable property of exactly the same value, one is taxed twice as much as the other, and this not because of any defect in the working of the law, but as a necessary result of its provisions. And the question to be answered is, are taxes so levied and assessed uniform, within the meaning of that term as employed in the Constitution?

It must be conceded that the uniformity required is not absolute, for as said by Mr. Justice Miller, in *State Railroad Tax Cases, 92 U. S., 612*, "perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system that most nearly attains this is the best. But the most complete system that can be devised, must, when we consider the immense variety of subjects which it embraces, be imperfect. And when we come to its application * * * made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

This extract points out very clearly one of the limitations with which the requirement of uniformity must be understood. Taxes are uniform in the sense of the Constitution, when any inequality of burden which results from their imposition is due to the imperfect knowledge or judgment of the persons whose duty it is to assess them.

When, however, the law itself is so framed that it necessarily produces gross inequality of burden, no matter how perfectly it may be administered, it would seem impossible to avoid the conclusion that it violates the mandate of the Constitution.

If some of the subjects of a given class were not taxed at all while others were, there would, of course, be a gross inequality in that the burden would fall on one and not on the other. But this is forbidden by clause 2, of Article IX, which ordains that all laws exempting property—other than certain enumerated subjects—shall be void. Hence if any given class of subjects be taxed, none belonging to that class can be exempted.

The mandate in favor of uniformity in section 1, means more than this. It is not satisfied until the taxes, which are imposed upon all the subjects of a given class, are so imposed that each person owning the same species of property, shall pay the same amount of tax, upon the same value, when that has been ascertained by the proper authority. The values need not, of course, be absolutely the same; but they must be so in the judgment of the official whose duty it is to fix them. When this is done, and when, the rate being fixed, the proportion between values and taxes is constant, theoretical uniformity has been attained; and this is all that is or can practically be required.

But if in one case the value to which the rate is applied is the expression of the judgment of the proper official, and in another a mere arbitrary nominal value, it is in the very nature of the case that the resulting taxes cannot be uniform. There can be no definite proportion between the value of the property of the citizen and the amount of his taxes. And as the findings of fact show, this would be the inevitable consequence of the enforcement of the law in question in this case, no matter how faultless its administration might be. We have, therefore, no hesitation in declaring that if all mortgages, money owning by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, including corporate loans, are by the act of 1885 embraced in the same class of subjects, section four of the act violates the constitutional mandate in favor of uniformity, and cannot be enforced.

Nor would the result be different if we should assume that the class to which corporate loans belong includes the mortgages, bonds and evidences of debt of corporations only. The findings of fact show that there are large amounts of bonds and evidences of indebtedness of corporations not doing business in this State, which are held and owned here. These are by the act taxable at their actual cash value, to be fixed by the local assessors, while the same subjects of taxation, when issued by corporations doing business in the State, are to be assessed at their nominal value. Hence the same want of uniformity which we have condemned above would exist here also, and must come into like condemnation.

But it has been suggested that the corporate loans mentioned

in section 4 form of themselves a distinct class. Let us assume that this is so. Then, under the facts, the necessary working of the law is that a citizen owning these loans to the value of ten thousand dollars, may pay a less amount of tax than another whose holdings are worth only five thousand. The only difference between the working of the law, on this assumption and on the other would be that while in the other cases some of the valuations would be arbitrary, here they would all be so; there in some cases there would be no definite proportion between the real value and the tax, here the want of proportion would exist in all cases.

The conclusion is that the act cannot be construed in harmony with the constitutional mandate as to uniformity of taxes by adopting any possible system of classification, and that it is, therefore, as to section 4, unconstitutional and void.

If this be so, judgment must be in favor of the defendant, and it is unnecessary to return to the question of validity of the assessment, which we therefore leave to be discussed hereafter if it arises.

Nor shall we now consider the other objections to the settlemant which are specified in the appeal. If we are in error in deciding the one to which we have given special attention to be fundamental, the others will appear upon the record, and will have to be passed upon before a final judgment can be entered. We prefer to rest our judgment, at present, upon the objection to the law for want of uniformity in the taxes levied under it.

We have no doubt that the defendant has a legal standing in this appeal, to test the constitutionality of the law and the validity of the settlement under it. While the tax is not imposed upon it, and it is simply required to retain the tax out of interest due and pay it over to the State, it is not, as is argued on behalf of the Commonwealth, a tax collector in the strict sense of the term. The settlement is against it; if it failed to appeal within sixty days after notice the settlement would become conclusive against it; there is no provision in the act for notice to the individuals who must pay the tax, and their rights, probably, cannot be determined in this proceeding; defendant has, therefore, a direct interest in the matter which entitles it to be heard, and if the tax is illegal and unconstitutional, it was under no obligation to retain it and pay it over to the State.

We have not thought it necessary to discuss or cite the cases relied upon by the learned Attorney General and his able Deputy. We do not think anything of authority will be found in them contrary to the conclusion at which we have arrived.

We have therefore arrived at the following

CONCLUSIONS OF LAW.

1. That section 4 of the act of June 30, 1885, is repugnant to section 1 of Article IX of the Constitution of Pennsylvania, which ordains that "all taxes shall be uniform within the territorial limits of the authority levying the same," and is therefore void.

2. That the settlement appealed from in this case is illegal and invalid because the taxes claimed therein, under section 4 of the act of June 30, 1885, are not uniform, as required by section 1 of Article IX of the Constitution.

3. That the defendant in this case has the legal right to interpose the defense of the unconstitutionality of the act, and the invalidity of the settlement made under it.

4. That judgment must be given in favor of defendant.

We therefore direct judgment to be entered in favor of defendant, unless exceptions be filed within the time limited by law.

(Signed) J. W. SIMONTON, *P. J.*

Office Supreme Court, U. S.
FILED,
FEB 24 1890
JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States.

Bell's Gap Railroad Company

vs.

Commonwealth of Pennsylvania.

No. 1497, October Term, 1889.

City of Chester

vs.

Commonwealth of Pennsylvania.

No. 1498, October Term, 1889.

MOTIONS:

1. To revoke the allocatur and quash the writ of error.
2. To dismiss the cause.
3. To affirm the judgment below.

BRIEF ON BEHALF OF THE NORTH PENNSYLVANIA RAILROAD COMPANY, AN INTERESTED PARTY, DEFENDANT IN COMMONWEALTH OF PENNSYLVANIA VS. NORTH PENNSYLVANIA RAILROAD COMPANY, No. 1556, OCTOBER TERM, 1889.

WM. B. LAMBERTON,
GEO. R. KAERCHER,
Counsel for North Pennsylvania Railroad Company.

In the Supreme Court of the United States.

BELL'S GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

No. 1479, OCTOBER TERM, 1889.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

No. 1498, OCTOBER TERM, 1889.

MOTIONS.

1. To revoke the allocatur and quash the writ of error.
2. To dismiss the cause.
3. To affirm the judgment below.

BRIEF ON BEHALF OF THE NORTH PENNSYLVANIA RAILROAD COMPANY, AN INTERESTED PARTY, DEFENDANT IN *COMMONWEALTH OF PENNSYLVANIA* vs. *NORTH PENNSYLVANIA RAILROAD COMPANY*, No. 1556, OCTOBER TERM, 1889.

So far as the motion of the Attorney General of Pennsylvania to revoke the allocatur and quash the writ of error in the case of the city of Chester, is based on grounds specially pertinent to the record in that case, the North Pennsylvania Railroad Company is not interested in it. The motion to quash in the Bell's Gap case seems to raise questions of wider consequence, as involving the correctness of the common practice pursued in Pennsylvania in the trial of tax cases. These cases are quite uniformly tried before the court, without a jury, under the provisions of an act of Assembly, approved the 22d day of April, 1874, entitled "An act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," and they usually come before the court in the shape of an appeal from an account settled by the Auditor General and approved by the State Treasurer. The appeal is in the first instance filed in the office of the Auditor General, and is accompanied by "specifications of objection," setting forth in detail the grounds, whether of fact or law, upon which the appellant claims to be relieved from the payment of the whole, or of any part, of the tax. The specifications must be sufficiently exhaustive, as they cannot be supplemented or amended at any subsequent stage of the proceedings.

Act 30 March, 1811 (P. L. 148.)
Porter v. *Commonwealth, 1 Pen. and Watts, 252.*
Commonwealth v. *Porter, 21, Pa. Rep. 385.*

The appeal is transmitted by the Auditor General to the Common Pleas of Dauphin County. In accordance with the provisions of the act of 1874 the court, after trial, states separately in an opinion findings of fact and conclusions of law thereon, based on the specifications of objection accompanying the appeal. These present all the questions of law that can be raised before the court and are argued with that understanding. It is believed to be a very unusual proceeding to file other and formal "points of law," which, so far as they might differ from the specifications of objection, would be irrelevant, and otherwise would be superfluous. The court decides the case as it is presented by the appeal, and it has been held that even a plea need not be entered, or the case be otherwise put at issue. These comments on the practice in Pennsylvania seem to be apposite from a perusal of the brief of the Attorney General.

Assuming, always, that the record in either, or both, of the cases stated in the caption, brings before the court certain questions arising under the Federal Constitution, not only the North Pennsylvania Railroad Company, which is before the court in a test case, but many other corporations, are interested in controverting the suggestion of the learned Attorney General, that such questions are frivolous. Upon the determination of these questions depends the liability, or non-liability, of certain corporations for the tax on their bonds in the hands of the owners thereof, which, it is alleged, the corporations should have retained from interest paid, under the provisions of the act of June 30, 1885.

This act is one of a series beginning with the act of 30th of April, 1864. Under the provisions of the act of 1864 (P. L. 219), and the act of May 1, 1868 (P. L. 112), the tax imposed on bonds for State purposes was collected by corporations of the State from their several taxable

bondholders at the time of the payment of interest, the questions now in controversy never having been propounded with respect to these acts. The act of 1868 was in turn repealed by the act of 21st of March, 1873 (P. L. 46), and with it the system of collecting the tax on corporate loans was, for a time, abandoned, and thereafter the tax was collected directly from the bondholders through the instrumentality of the county officers, along with the tax on other moneyed capital in the hands of individuals. By the act of June 7, 1879 (P. L. 112), an attempt was made to again revive the former system of collection, and section seventeen directed all corporations paying interest on loans taxed for State purposes only to "deduct the said tax from the said interest and pay the same into the State Treasury." The act of 1879, and the supplemental act of 1881 (P. L. 99), which in this connection demands no comment, occasioned much discussion in the great number of appeals taken by corporations from accounts settled against them for the tax. The questions of immediate interest were ultimately decided adversely to the Commonwealth in the latter part of 1883, in the case of Commonwealth *v.* Lehigh Valley Railroad Company, 104 Pa. Rep. 89, and in connection with this fact, it is to be noted, as having an important bearing on the construction of the act of 1885, that the numerous defects in the former acts persistently advertised through a succession of years in a large number of appeals, as well as the amounts involved, had, to an unusual extent, drawn attention to the subject of tax legislation.

The Supreme Court of Pennsylvania, in Commonwealth *v.* Lehigh Valley Railroad Company, *supra*, decided that the acts of 1879 and 1881 provided no means for the valuation and assessment of the bonds, from the interest on which they directed corporations to deduct the tax; that the value of the bonds on which the tax was assessed was the *actual*, and not the nominal or par value, and a legal ascertainment of that value was essential to the assessment of a valid tax; that the acts did not constitute an independent scheme for the taxation of corporate loans, but required to be aided by the machinery of the act of 1844. It was to

remedy these defects that the act of June 30, 1885, a further supplement to the act of 1879, was passed. This act (P. L. 193) provided as follows:

"SECTION 1. That all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, also, all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes), and all public loan or stocks whatsoever (except those issued by this Commonwealth or the United States), and all moneys loaned or invested in any other State, and all moneyed capital in the hands of individual citizens of the State, shall be and are hereby taxable for State purposes, at the rate of three mills on the dollar of the value thereof annually: *Provided*, That the same shall, after the passage of this act, be exempt from all taxation, except for State purposes: *Provided*, The provisions of this act shall not apply to building and loan associations."

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually, on the first Monday of November, to the Auditor General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every

failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

Upon appeals from accounts settled under this act, a number of opinions have been rendered by the Supreme Court of Pennsylvania, notably those in the case of Commonwealth *v.* Delaware Division Canal Company, 123 Pa. Rep. 594, and Lehigh Valley Railroad Company *v.* Commonwealth, 25 Weekly Notes of Cases, 24, which have, by order of the court, been filed with the record in the case of Commonwealth *v.* North Pennsylvania Railroad Company, No. 1556, October term, 1889. In the former opinion the court decides that corporate bonds may be distinguished from other bonds as subjects for classification, and that by the fourth section of the act of 1885, "they are taken out of the general designation of subjects contained in the first, and as a *distinct class* are subject to a different standard of valuation." The latter opinion supplements the former by the declaration that it was its purpose "to show that the tax was *in the nature of a specific tax*, not a tax upon actual value; that the Legislature having fixed the nominal value of the bonds as the basis of taxation, *no further assessment properly so called*, was required; that it was a proper exercise of legislative power to require the company's treasurer to "*assess*" the tax, that is to say, *to determine the amount of the company's loans liable to taxation at their nominal value*, and to apply thereto the rate fixed by law, the taxation being the result of the rule thus applied." Both decisions affirm the right of the State to collect the tax *through the intermediary of corporations*.

If the tax imposed by the fourth section of the act of 1885 is a specific tax, one branch of the discussion is disposed of. But if it is otherwise, the giving it a name or characterizing it, as being "in the nature of a specific tax," will not divest it of its natural attributes. It is, on the other hand, contended that the tax imposed by the first section of the act on *all*

bonds without distinction is an *ad valorem* tax; the fourth section merely provides for the collection of the tax imposed by the first, and corporate bonds are purposely and knowingly included in *all bonds* so taxed.

The act of 1885 must be construed in connection with its predecessors, and in view of the history of tax legislation in Pennsylvania. It imposed a tax which, at varying rates, has been yearly collected since 1844 (P. L. 501). The clauses of the acts of 1844, 1879, 1881 and 1885, designating the taxable subjects, so far as moneyed capital is concerned, are substantially identical in terms. They all alike tax mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, * * * and all moneyed capital in the hands of individual citizens of the State, * * * on the dollar of the value thereof annually. And that value has repeatedly, and with respect to these acts, been held to be the *actual value*.

Commonwealth v. *Lehigh Valley Railroad Company*, *104 Pa. Rep. 89.*

The act did not create a new tax, its purpose was, as was said by Mr. Justice Clark in Commonwealth *v.* Delaware Division Canal Company, 123 Pa. 617, *supra*, "*to supply the machinery which was found to be wanting in the acts of 1879 and 1881 for taxation of corporate loans;*" that is, it provided, in the fourth section, for an *assessment* to be made by a *personal assessor*, recognizing, in theory at least, the judicial character of the office There would be no hesitation about acknowledging this, if the machinery would work on the original basis. Its failure to do so and the effort to make it work on some other, has resulted in the present controversy.

The Legislature, with an eye to precedents, adopted for the collection of the tax on corporate loans substantially the provisions of the forty-second section of the act of 1844 (P. L. 501), for the collection of the tax on municipal loans, which had already received judicial sanction, as applied to corporations by the act of 1864 (P. L. 218), in Maltby *v.* Reading and Columbia Railroad Company, 52 Pa. Rep.

148, and Delaware, Lackawanna and Western Railroad Company *v.* Commonwealth, 66 Pa. Rep. 64. But subsequent to the determination of those cases, a new Constitution was adopted in Pennsylvania (1873), which, in section one of article IX, requires, that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same," while the reasoning in Maltby *v.* Reading and Columbia Railroad Company, and in Delaware, Lackawanna and Western Railroad Company *v.* Commonwealth was predicated on the fact *that uniformity and equality of taxation was not prescribed by the Constitution of the State, nor aimed at by the taxing acts themselves.*

Kirby v. *Shaw, 19 Pa. 258.*

Grim v. *Weisenberg School District, 57 Pa. Rep. 437.*

Weber v. *Reinhard* et al., *73 Pa. Rep. 370.*

Commonwealth v. *Pennsylvania Coal Company, 2 Pearson, 402.*

Maltby v. *Reading and Columbia Railroad Company*, supra.

This position is fortified by the more recent case of the Commonwealth *v.* Martin, 107 Pa. 185, in which it was held that the tax on *municipal* bonds might still be collected under the act of 1844, because no other mode of assessment and collection had been provided by the legislature, and because on the authority of Lehigh Iron Company *v.* Lower Macungie Township, "section one of Article IX of the Constitution is not immediately operative, but was intended by the convention to be mandatory upon the legislature to enact laws framed upon its special intent, and to repeal all laws inconsistent therewith, leaving the legislature in the exercise of sound and wise discretion to time the repeal after proper laws have been passed."

Lehigh Iron Company v. *Lower Macungie, 81 Pa. Rep. 482.*

Indiana County v. *Agricultural Society, 85 Pa. Rep. 357.*

Coatesville Gas Company v. *Chester County, 97 Pa. Rep. 476.*

By noting the act of 1844 as an exception to the rule, Commonwealth *v.* Martin, practically declared its methods to be indefensible in an act passed since 1873. Under the altered circumstances, Maltby *v.* Reading and Columbia Railroad Company, and other like cases, are no longer available to support the methods of the act of 1844. Upon examination it became evident that the provisions of the fourth section of the act of 1885, as applied to an *ad valorem* tax, would result in unequal taxation, in violation of the Constitution of the State; the fact that it did so was duly found by the court below in its "Findings of Fact," which are entitled to as much weight as the verdict of a jury.

Rohrheimer v. *Hoffman*, *103 Pa. Rep. 409.*

It was necessary, therefore, if the settlements made by the accounting officers of the Commonwealth were to be sustained, that the tax on corporate bonds should be decreed to be a specific tax on a separate class of bonds, or something equivalent to it, and this was the purpose and effect of the decisions of the Supreme Court of Pennsylvania in the Delaware Division Canal Company case and in the later Lehigh Valley case, reversing the court below. The court did not, indeed, go to the extent of saying that the tax was specific, and seemingly admits it to be an *ad valorem* tax, on the basis of an assessment that does not assess, and hence *in the nature of* a specific tax. The result is a confusion of terms. The essential difference between a specific and an *ad valorem* tax is that in one case a *bona fide* assessment is requisite and in the other no assessment at all.

Cooley on Taxation, 238.

Manifestly, the tax remains an *ad valorem* tax, the same tax that is imposed on all bonds in the first section of the act, and demands for its collection such process of law as is sanctioned by authority in the collection of such taxes. The denial of this is a denial of the equal protection of the laws and results in unlawful deprivation of property, in contravention of the Federal Constitution.

Article V, and section 1 of article XIV, of the amendments of the Constitution of the United States.

Viewed as a tax on actual value, the machinery provided by the fourth section of the act of 1885 is fatally defective.

There is *no assessment at all* in any proper sense of the word. It is a condition to all lawful taxation that there should be a valid assessment of the tax. This principle is supported by very many authorities, and has been uniformly recognized by the courts of Pennsylvania.

Cooley on Taxation, 352.

Com'th. v. *Phoenix Iron Co., No. 242, January term, 1868, Dauphin Com. Pleas.*

Com'th. v. *Lehigh Valley R. R. Co., 104, Pa. Rep. 89.*

"An assessment, strictly speaking, in an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district." It involves the idea of valuation, a comparing of values, and is in its nature a judicial act.

Cooley on Taxation, 351.

In the elaborately considered case of Bank of Columbus *v.* Hines, 3 Ohio 1, it was said, "Uniformity in taxation implies uniformity in the burdens of taxation and the equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation." "But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax. it must be uniform over all the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable."

It does not matter whether the discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of assessment.

Cooley on Taxation, 189.

Worth v. *Railroad Co., 89, N. C. 301.*

The principle is not violated by the fact that objects of taxation are classified to be assessed by different persons or bodies, provided only that the uniformity of rule be preserved.

The cases of County of Santa Clara *v.* Southern Pacific R. R. Co and others, argued before the Circuit Court of the United States for the District of California, involved actions

for the recovery of unpaid State and county taxes upon certain property of the several defendants. "The defendants were corporations formed under the laws of California and the taxes claimed were laid on the franchises, road-beds, rails and rolling-stock of each of them, without separation or distinction in the valuation of the different parts comprising the whole."

"By the Constitution of California not only is the *ad valorem* rule established for the taxation of property, but provision is also made for its assessment. The franchises, roadway, road-bed, rails and rolling stock of railroads operated in more than one county are to be assessed by a special board termed the State Board of Equalization. All other property is to be assessed in the county in which it is situated. * * * The State Board is authorized to act not only as assessor of the franchises and road-way, road-bed, rails and rolling stock of the railroads mentioned, but as a board of equalization of the taxable property in the several counties, so that equality may be secured between the taxpayers of different localities. * * * But though the officers by whom the assessment of these properties is to be made be different, the properties are subject to the same rule of taxation; that is, they are to be taxed in proportion to their value."

It was held that the assessment made under article 13 of that Constitution, which declares that a "mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment, be deemed and treated as an interest in the property affected thereby," and that, "except as to railroad or other *quasi* public corporations, the value of the property affected, less the value of the security, shall be assessed and taxed to its owner," the assessment against the property of railroad corporations defendants, was void, as contrary to the provisions of the Constitution of the United States, because made without the deduction of the mortgages thereon as was done in the case of individuals. "Uniformity in taxation requires uniform-

ity in the mode of assessment, as well as in the rate of percentage charged."

County of Santa Clara v. *Southern Pacific R. R. Co., etc., 18 Fed. Rep. 385.*

In County of San Mateo *v.* Southern Pacific R. R. Co., another case arising under the same constitution, Justice Field, in an opinion which has been widely cited with approval, said: "The discrimination complained of arises from the different rule adopted in ascertaining the value of property of railroad corporations as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property whatever its form or nature, the property is taken as representing a pecuniary value; as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires higher value to be placed upon the defendant's property than upon the property of individuals similarly encumbered, or rather requires the assessor of the defendant's property in estimating its value to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of property of individuals. It is not classifying property to make this distinction in determining its value." Such discrimination was unlawful.

County of San Mateo v. *Southern Pacific R. R. Co., 13 Fed. Rep. 722.*

The same principle was affirmed in Cummings *v.* Merchants' Bank of Toledo, 11 Otto, 153, where the court decided that a law providing for different boards of assessment was constitutional under the provisions of the Constitution of Ohio, because if the assessors did as they were directed by law to do, namely assess property at its real value, the machinery of the boards would not affect the uniformity of the result, and the ruling in Bank *v.* Hines was referred to with approval.

Under statutes of North Carolina, canal and railroad companies mentioned in a certain schedule, designated by the letter "C," were classed to be assessed in a particular man-

ner. The Supreme Court of that State said: "The main objection to the constitutionality of these statutes, founded upon a violation of the rule of uniformity, is that the tax imposed upon the corporations designated in schedule "C," is to be assessed by a different mode of assessment from other corporations in the State of the same class not mentioned in the schedule."

"The basis of all *ad valorem* taxation is necessarily the assessment of the property; that is, the estimate of its value; whatever affects the value necessarily increases or diminishes the tax."

County of Santa Clara v. *Southern Pacific R. R. Co. 18 Fed. Rep. 385, supra.*

The "appraisement" commanded by section 4 of the act of 1885 is an *arbitrary declaration of value*, which has frequently been held to be beyond the limits of legislative authority.

Desty on Taxation, 463.

Thus, in North Carolina, so much of the laws of 1874–75 as directed that railroad beds listed for taxation should not be valued at less than $8,000 per mile, without regard to the real value, was held to be in conflict with a constitutional provision providing for a "uniform rule" of taxation according to a "true value in money."

Atlantic, etc., R. R. Co. v. *Commissioners, 75 N. C. 474.*

In Nevada it was held: An act "declaring that three fourths of the value" ——— of the proceeds of mines ——— "shall be subject to taxation, is manifestly unconstitutional. The value once being ascertained, the whole is liable to taxation;" the court affirming the principle, "The Legislature may direct the manner of assessing property so as to obtain a fair valvation. This court could only declare such a law unconstitutional when it was manifestly intended to evade the provisions of the Constitution rather than to effect a fair valuation."

Nevada v. *Eastabrook, 3 Nev. 173.*

The Legislature of California adopted as the basis of taxation in the city of Sacramento for 1863 the assessment roll of 1862. The Court of Appeal held, "The Legislature cannot by law fix the assessed value of property."

People v. *Hastings*, *29 Cal. 449.*

In another California case it was held, that an act "so far as it provides for amendments of assessment rolls, is ineffectual for any purpose, because if the law, without amendment, contains substance sufficient to make it valid as an assessment of property, the curative effect of the statute is not needed; and if it does not, no legislative amendment can either make the assessment or empower any other officer except the assessor to make it."

People v. *Hastings*, *34 Cal. 571.*

In Attorney General *v.* Leavenworth, 2d Kansas, 61, the court held the territorial tax of three mills, imposed under a law of 1860, to be laid on the then taxable property, and the poll tax against the then taxable individuals of the territory. The act of 1863 "to require certain counties to levy, collect and pay over delinquent territorial taxes," attempted to impose the aggregate of the uncollected taxes upon the *property* taxable within the delinquent county, according to the estimate of 1863, and was not an attempt to collect the old tax. This was the levying of a tax within the meaning of the Constitution, providing for a uniform and equal rate of assessment and taxation, and the law was void.

In People *v.* Board of Assessors of Albany, 9 Hun. —, Chapter 761 of the laws of 1866 of New York State, providing for the assessment of the stock of State and National banks, was construed to mean, that the shares should be assessed at their true value, and not at their par value.

Massachusetts in 1873 demanded as a tax one-fifteenth of the amount of dividends paid by corporations to non-resident stockholders. The tax was declared unconstitutional, because all taxes in Massachusetts must be proportional, and the property taxed was within the Commonwealth.

In the words of the court: "While on the one hand the authority"—to levy and collect taxes—"is conferred in broad and comprehensive terms, so on the other hand the

principle on which it is exercised is clearly defined. The contention in the present case is not that the Legislature had no authority to tax shares of non-resident owners. This is conceded. But the controversy is as to the method in which the power has been exercised."

Oliver v. *Washington Mills*, *11 Allen*, *268*.

Under the act of February 2d, 1877, a board for the assessment of property of railroad companies was erected in Alabama. The act continued, "The valuation of the property of railroad companies shall proceed upon precisely the same principles as the valuation of every other species of property; that is to say, no deduction or allowance shall be made on the ground of any amount of indebtedness, or mortgage, or incumbrance of any character, but the valuation of such property shall be had exclusively upon the consideration of what a clear fee simple title to such property would sell for, * * * but in no case where the data of such assessment shall be in the possession of the board, shall such property be estimated at a sum less than that which, at an interest of 8 per cent., would yield the sum shown by such data to constitute the net earnings of such property."

The court held the act void under the Constitution of that State, saying:

"The General Assembly cannot declare an artificial value of property."

"The Constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of property of individuals or corporations, and assess taxes on such valuations." "If the Legislature had declared that all railroads should be taxed as if the value of the road was so much per mile; or that all lands should be taxed as if they were of a particular value per acre, there would be no discussion of the question that legislative power had been transcended. What real difference is there between such an enactment and an enactment like the present—that the net earnings of a railroad shall be regarded as eight per cent. of the value of its property? Why say eight per cent.? True, eight per cent. is the legal rate of interest, but is it consequently a legal standard, or a

practical standard of the value of property, when such property will produce, by way of income, that sum? Property which will produce only that income will but rarely find a purchaser who will invest in it for the purpose of obtaining interest only. The rate of interest is not a standard of the value of the property, but the measure of damages fixed by law for the forbearance of a debt, the loan of money, or its detention after the date it should have been paid."

Board of Assessment v. *Alabama Central Railroad Co.*, *59 Ala. 551.*

The constitutionality of the act is defended on the ground that the Legislature may, in the exercise of its extensive discretion and sovereign power, sub-classify the members affected by the tax, and then *assume* the value of the taxables thus segregated to be equal. It is not conceded, and is, on the contrary, denied, that the power, if it exists, has been constitutionally exercised.

If an *assumption* of a legislative body may support a constitutional tax without regard to the truth of the fact, within what limits must such assumption be confined, and in what body is vested the right to define the limits? Probably in no other State has the legality of unequal taxation been more vigorously defended than in Pennsylvania. There are in all States judicial declarations, that absolute equality of taxation, however desirable, is unattainable under general laws, but such inequality is always affirmed of the necessary inequality of benefits, or attributed to the imperfections of human judgment, and they in no case countenance legislative assumption, contrary to fact, or an arbitrary assessment of an *ad valorem* basis of taxation. As well might the Legislature assume every acre of land to be of the same value, or all buildings, or all incomes to be of like amount. The assumption need not be violent to produce grossly unequal results. The actual difference in the

tax upon any two bonds may be very small, and yet one who has all his property invested in corporate bonds alone may be taxed at a very much higher rate than one who has invested his property in another direction.

Abundant testimony has been produced, and conclusively shows that, as a rule, corporate securities are not uniformly worth their par value, but, on the contrary, are, in a vast majority of cases, above or below it, and differ greatly between themselves, and that this is equally true as to the securities of Pennsylvania corporations.

For other equally important prerequisites of lawful taxation the act of 1885 makes no provision.

"However summary and apparently arbitrary are the methods and processes in tax cases, they can not deprive the citizen, when his property is taken in the course of this enforcement, of a trial of the right to take it, before some impartial judicial tribunal to which the public authorities must justify their proceedings."

Cooley on Taxation, 527.

Property can only be taken by due process of law, "and this principle is as much applicable in the case of taxation as in any other case."

The taking of property under the guise of a tax, without giving to the person taxed the right of review or appeal, has been designated as confiscation. It is not sufficient that a court of equity may intervene to prevent the wrong, the recognized principles regulating the collection of taxes, require methods, "in which one who is wrongfully assessed for taxation, or unequally taxed, may have abatement of the assessment or tax, without resort to the customary legal remedies.

Cooley on Taxation, supra.

Under the act of 1885 the money of the bond-owner is taken, the corporation being, in any view of the act, merely

a tax collector. But not only is no notice of assessment given to the person taxed, but he is left without redress in any stage of the process of collection, before any tribunal, by suit or otherwise. *The tax is not specific*, as on so many bonds, laid on a numerically uniform basis, but by the terms of the act an *assessment* of the taxables is necessary, and the basis is theoretically at least *ad valorem*. In such case notice to the taxpayer, and an opportunity to be heard in his own behalf are essential to the lawful collection of the tax.

Such is the "due process of law" demanded by usage, and sanctioned by authority, in the levying and collecting of lawful taxes, and it is the right of each citizen, under the Constitution of the United States, that such usage be observed.

Hagar v. *Reclamation Dist.*, *111 U. S. 701.*
Walston et al. v. *Nevin et al.*, *128 U. S. 578.*
Davidson v. *New Orleans*, *96 U. S. 97.*

The consequences complained of flow directly from the alleged exercise of the legislative power to classify the subjects of taxation. It is said by Mr. Justice Clark in Commonwealth *v.* Delaware Division Canal Company, "the moment we concede the power to classify we have disposed of the question of uniformity." While the general power of the Legislature may not be denied, it is nevertheless confined within constitutional limits, and its exercise in particular cases may be subject to the control of the federal court.

The classification in the present instance of bonds and mortgages of corporations from those of individuals is based on no substantial or intrinsic difference in the nature of the security. The obligation to pay the debt is as binding in one case as the other; the same security may be at one time in one class and at another time in another. Suppose a mortgage to be executed by a corporation for the payment of pur-

chase money on coal or ore lands. This is frequently done and the bonds thereby secured may be indifferently one or more. Under the act of 1885 such mortgage is to be assessed at par by the officers of the corporation. Within the year the land may be sold to an individual and the mortgage then is to be assessed at its actual value by a county officer. But the mortgage has not changed its character in the least, yet in the second year it may be appraised above or below its par value and be taxed at a different rate, by reason of discrimination in the method of assessment.

"A mere change of ownership, under the provision in question largely effects the amount of taxes upon the same property without any change in the character, condition, value, use, or circumstances of the property itself." Such discrimination was denounced in County of Santa Clara *v* Southern Pacific R. R. Co., 18 Fed. Rep. 385, affirmed in 118 U. S. 394.

San Manteo County v. *Southern Pacific R. R. Co., 13 Fed. Rep. 722.*

Classification should be based upon some intrinsic difference in the things taxed. The classification made in section 4 of the act of June 30, 1885, is one of owners; that is, holders of the securities of Pennsylvania corporations are distinguished from the holders of securities of other kinds. On that principle men may be taxed according to race and color. This is no supposition, since it has already been attempted.

Thus, a law declaring a tax upon the polls and property of persons of one color for the exclusive education of the children of that color was held to be unconstitutional in North Carolina.

Puitt v. *Gaston County, 94 N. C. 709; 55 Am. Rep. 638.*

In California, a tax was imposed upon Chinamen under an act "to protect free white labor against competition with Chinese coolie labor. The statute was held to infringe the Constitution of the United States, but it was also declared to be void under the provision of the Constitution of Cali-

fornia, that taxation be equal and uniform throughout the State.

Lin Sing v. *Washburn*, *20 Cal. 534.*

An exemption from taxation of property to the amount of $500, of widows and maids, was decreed unconstitutional in Indiana, because unequal and not for charitable purposes.

State v. *Indianapolis*, *69 Ind. 375; 35 Am. Rep. 223.*

See also *Worth* v. *Wilmington and Welden R. R. Co.*, *89 N. C. 291.*

Parish of Orleans v. *Cochran*, *20 La. An. 373.*

The act of 1885 violates another provision of the Constitution of the United States, in that it impairs the obligations of contracts. Section 10, Article I:

The retention by a corporation of a portion of the interests due on its bonds as a tax has been sustained in Pennsylvania as a constitutional method of collection, on the ground that thereby the obligation of the contract between the corporation and its creditors was not violated, because, as Judge Pearson said in the case of Susquehanna Canal Co. *v.* Commonwealth, 72 Pa. Rep. 78, "*It is immaterial to the creditor whether he pays the tax directly, or it is advanced under authority of law by his debtor and deducted from the obligation.*"

Assuming the reason given to be sound, the conclusion fails when it is made to appear, that *it does make a difference* to the taxpayer to whom he pays his tax. Reduced to final terms, the argument is not, that the obligation of the contract of the corporation is not changed by the act, but that the creditor, who is also the taxpayer, shall not be permitted to complain, because he owes the tax, and suffers no damage by having it collected by his debtor. But what if he does suffer damage? Manifestly with the change of fact, the law, which clearly did impair the obligation of the contract between the corparation and its creditor, stands without

justification. To declare the obligation of the contract not impaired is to refuse to recognize the meaning of words.

The reasons which justified the conclusions under former acts fail in this, for on inspection it appears that the taxpayer *is prejudiced*, not only in having to pay a greater amount than he would pay, if his tax were collected through other channels, but furthermore, in being deprived of those safeguards and substantial advantages of lawful assessment, notice, and right of appeal, which are afforded to other payers of the same tax.

Shirk v. *Bucher*, *58 Pa. Rep. 96.*

"The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all supposed cases. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation."

Story on the Constitution, Vol. 2, sec. 1385.

Irrespective of any question of justification, the act is in direct conflict with decisions of the Supreme Court of the United States.

In Murray *v.* Charleston, 6 Otto, 444, that court said, "A change of the express stipulation of a contract, or relief of a debtor from strict and literal compliance with its requirements, can no more be effected by the taxing power than it can be by the exertions of any other power of a State Legislature. * * * It may then safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State Treasury.'"

See also *Railroad Company* v. *Penna.*, *15 Wallace, 300*, supra.

Hartman v. *Greenhow*, *12 Otto. 683.*

Many of the bonds affected by the tax are coupon bonds. The coupons are payable to bearer and become, when detached, independent contracts between the company and the holders of them. They are presented for payment through banks and brokers, without respect to the ownership of the bonds.

The duty of keeping track of the thousand changes in the ownership of bonds and coupons occurring in the daily transactions of the exchange, if possible of performance, is nowhere imposed on corporations in this State.

The 4th section of the act of 1885 was passed with the aim of "reaching subjects capable of successful concealment, and liable to escape the notice of the most vigilant assessor." "The residence of the holders is a fact of which the corporation is most likely to be ignorant."

Comth. v. *Lehigh Valley R. R. Co., 104 Pa. Rep. 102.*

The claim of a State to collect through corporations a tax levied on coupon bonds was discussed, in a very recent case, by the Supreme Court of Tennessee, in which it was decided:

"The negotiable coupon bonds of a corporation are taxable only to the owners of the same at their places of residence, and the corporations cannot be required to impound sufficient of the interest due such bonds to pay the taxes assessed to them by the municipality where the corporation is located."

Referring to a provision similar to that in the Pennsylvania act intended to enforce such collection, the court said:

"There are two other infirmites which attach to this part of this act. The first is: That the tax is imposed upon the holder of the bond; the corporation is required to reserve the tax from the interest due; the bonds are coupons bonds and run for thirty years; such coupons may be detached and are negotiable. If the coupon should be owned by A. and the bond by B., the deduction of the tax from the coupon would be to compel A. to pay the tax of B. This precise question arose and was determined in the case of Hartman *v.* Greenboro, when it was held that the tax against the bond was not collectible from the interest, where it appeared

that the coupon belonged to one and the coupon to another, 102 U. S. 684."

"The second infirmity is this: The tax against non residents of the State is void in toto. * * * Now, when a coupon is presented for payment how is the company to determine whether it may lawfully reserve the tax from its interest payment. If the coupon does not belong to the owner of the taxed bonds it cannot reserve any tax. If it does not belong to a resident of the State it cannot reserve any tax. If it does not belong to a resident of Nashville it cannot reserve the city tax. It it does not belong to a resident of the county it cannot reserve either the county or city tax. The burden imposed by the act upon the corporation with respect to the collection of the tax lawfully assessed is too onerous, and threatens grave injustice. It would have no way to secure itself against liability to either the bondholder, whose interest it has illegally detained, or to the State, for failure to recover the tax justly due, except by requiring every coupon to be sued upon. The whole scheme of the act, in so far as to undertake to convert corporations into agencies for the collection of a tax upon their bondholders, is fatally defective and void."

South Nashville Street Railroad Co. v. *Morrow, Vol. 5, Railway and Corporation Law Journal (March 16, 1889), 248.*

In Hartman *v.* Greenhow, 102 U. S. 672, referred to, the same conclusion was reached, the Supreme Court of the United States, reaffirming of coupons what it had already said in Clark *v.* Iowa City: "These coupons, when severed from the bonds, are negotiable and pass by delivery. They cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity if for any reason the bonds are cancelled or paid before maturity, nor their negotiable character, nor their ability to support separate actions. They then possess the essential attributes of commercial paper, as has been held by this court in repeated instances."

Clark v. *Iowa City, 20 Wallace, 583.*

For the reasons above given it is submitted the motion of the Attorney General of Pennsylvania should not prevail.

WM. B. LAMBERTON,
GEORGE R. KAERCHER,
Counsel for North Penna. Railroad Company.

EXTRACTS FROM ACTS OF ASSEMBLY.

Act 1844, P. L. 497.

SECTION 32. * * * *Be it further enacted*, That from and after the passage of this act * * * all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work and labor done, and bank notes; also all shares of stock in any bank, institution or company, now or hereafter incorporated by or in pursuance of any law of this commonwealth, or of any other state or government; and on all shares of stock or weekly deposits in any unincorporated saving fund institution, and all public loans or stock whatsoever, except those issued by this commonwealth, and all money loaned or invested on interest in any other state; also all household furniture, including gold and silver plate, owned by any person or persons, corporation or corporations, when the value thereof shall exceed the sum of three hundred dollars, * * * shall be valued and assessed and subject to taxation for the purposes in this act mentioned, and for all State and county purposes whatsoever.

SECTION 42. * * * And that it shall be the duty of the treasurer of each county, incorporated city, district and borough of this commonwealth, on the payment of any dividend or interest, to any holder or agent claiming the same, on any scrip, bond or certificate of indebtedness issued by said incorporated city, district or borough aforesaid, to assess the tax herein made and provided for state purposes, upon the nominal value of each and every said evidence of debt; said tax to be deducted by the said treasurer, on the payment of any interest or dividend

aforesaid, and the same shall be held by him until paid over to the state treasurer; and the said treasurers shall be subject to the same penalties and liabilities now prescribed by existing laws in relation to taxes on bank dividends.

Act 1864, P. L. 219.

SECTION 3. That every president, treasurer, cashier, or other officer of any company incorporated, or that may be hereafter incorporated, which pays interest to its depositors, bondholders or other creditors, upon which, by the laws of the commonwealth, a state tax is imposed, shall, before payment of the same, retain from said depositors, bondholders, or creditors, the amount of state tax imposed by existing laws, and shall pay over the same to the state treasurer, and that all the laws regulating the mode of such payment in regard to treasurers of counties, cities and boroughs be, and the same are hereby extended to the financial officers thereof, and they are hereby required to collect and pay over the taxes due to the state, on such payments of interest, as provided in this section, to be done by officers of incorporated companies; and in case of any officer neglecting or refusing to retain the same, he shall become personally liable for the amount.

Act 1868, P. L. 112.

SECTION 11. That the president, treasurer, or cashier of every company, except bank or saving institution incorporated under the laws of this commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year to the state treasurer, for the use of the commonwealth; and every president, treasurer or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said

creditor, during the year ending on that day; and thereupon the auditor general and state treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law; and in the settlement of said accounts the persons aforesaid shall be allowed the same commission or compensation as is now allowed by law to county treasurers; and in case the said president, treasurer or cashier shall neglect or refuse to make the report required by this section, within sixty days after the time specified, he shall forfeit to the State the amount of his commission for such failure or neglect: *Provided*, That the principal sums, from the interest of which the said tax is deducted, shall not be assessed and taxed for state purposes in the valuation of personal property or returned by county commissioners to the board of revenue commissioners.

Repealed by act of March 21, 1873.

Act 1879, P. L. 120.

SECTION 17. That all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes), also all shares of stock in any bank, banking or savings institution or company, now or hereafter incorporated by or in pursuance of any law of this commonwealth, and all public loans or stocks whatsoever, except those issued by this commonwealth or the United States, and all money loaned or invested on interest in any other state, and all other moneyed capital in the hands of individual citizens of the state, shall be and are hereby made taxable for state purposes, at the rate of four mills on every dollar of the value thereof annually; * * * and all corporations paying interest on loans hereby taxed for state purposes only, shall deduct the said tax from the said interest and pay the same into the state treasury.

Act 1881 P. L. 99.

(Supplement to act of 1879).

SECTION 1. *Be it enacted, etc.*, That all mortgages, money owing by solvent debtors, whether by promissory note or penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work or labor done and all obligations given to banks for money loaned and bank notes, also all shares of stock in any bank, banking or saving institution or company, now or hereafter incorporated by or in pursuance of any law of this commonwealth or the United States, and all money loaned or invested in any other state, and all other moneyed capital in the hands of individual citizens of the state, shall be and are hereby taxable for state purposes, at the rate of four mills on the dollar, of the value thereof annually. * *

SECTION 2. That hereafter all corporations, paying interest on a loan or loans which are taxable for state purposes whether secured by bond, mortgage, recognizance or otherwise, shall report annually, in the month of November, to the auditor general the amount of such indebtedness owned by residents of this commonwealth, as nearly as can be ascertained, under oath of the president or treasurer, and shall pay into the state treasury four mills upon every dollar of such indebtedness so returned and owned by residents as aforesaid, within fifteen days after the thirty-first day of December in each year; and for every failure to report or pay as aforesaid the auditor general shall add ten per centum as a penalty to the said tax; and the said tax may be deducted by the corporation paying the same from the interest on such indebtedness, whereupon such indebtedness, whether secured by bond, mortgage, judgment or otherwise, shall be exempt from other taxation in the hands of the holders thereof.

Office Supreme Court U. S.
FILED
JAN 23 1890

In the Supreme Court of the United States.

CITY OF CHESTER

VS.

Commonwealth of Pennsylvania.

No. 1498, October Term, 1889.

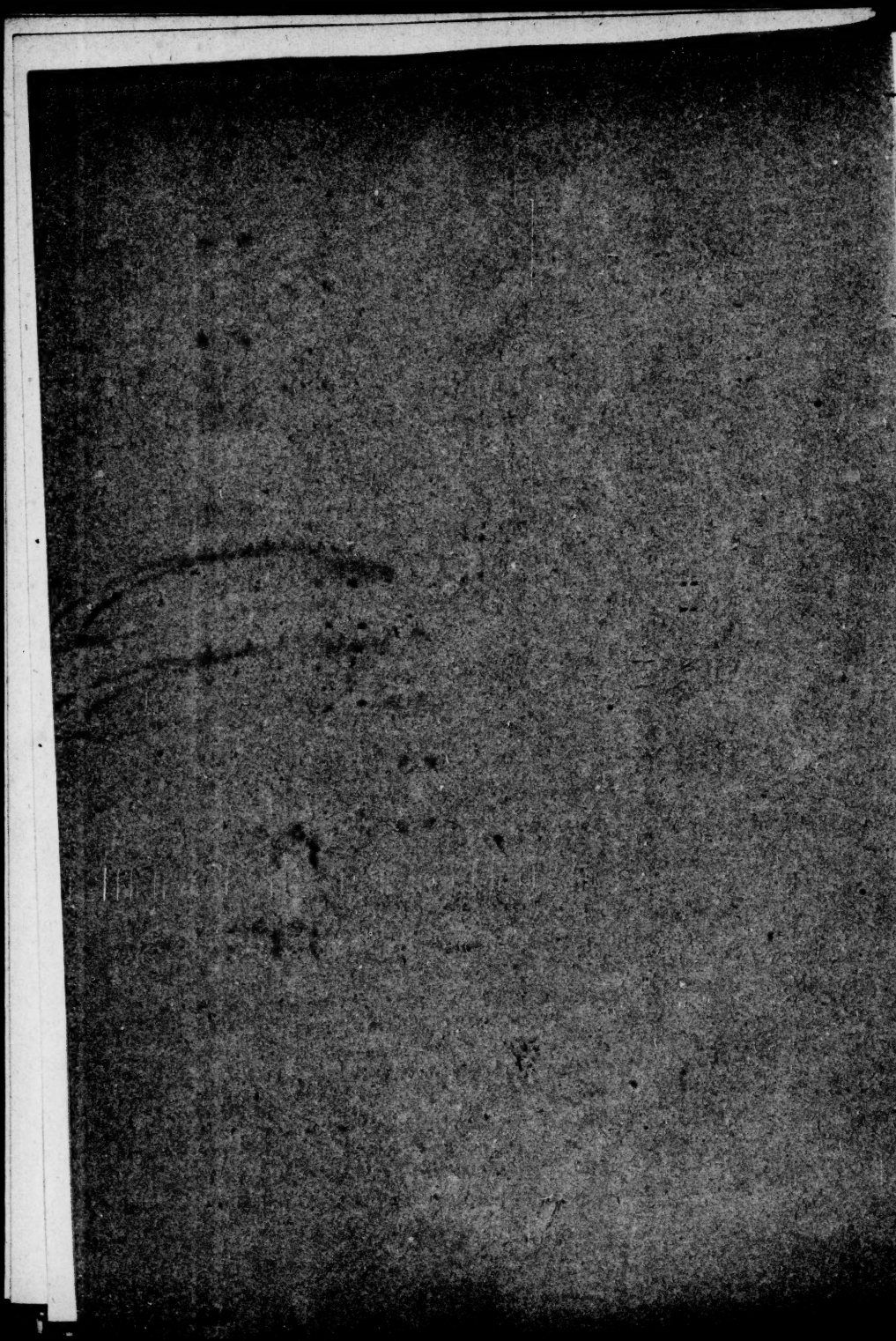
Error to the Supreme Court of Pennsylvania.

MOTIONS:

1. **To revoke the *allocatur* and quash the writ of error.**
2. **To dismiss the cause.**
3. **To affirm the judgment below.**

MOTIONS AND BRIEF ON BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA.

JOHN F. SANDERSON,
Deputy Attorney General.
WILLIAM S. KIRKPATRICK,
Attorney General.



In the Supreme Court of the United States.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

NO. 1498, OCTOBER TERM, 1889.

Error to the Supreme Court of Pennsylvania.

MOTION TO REVOKE ALLOCATUR AND QUASH WRIT OF ERROR.

And now, January 27, 1890, comes the Commonwealth of Pennsylvania, by her Attorney General, William S. Kirkpatrick, into Court and causes the Court here to understand and be informed:

That the plaintiff in error, the City of Chester, appeared by counsel on the 11th day of February, 1889, before the Honorable Joseph P. Bradley, one of the Associate Justices of this Court, and presented its petition praying for the allowance of a writ of error to the Supreme Court of Pennsylvania, and setting forth that upon the trial of the cause, in which the judgment was rendered in the trial court to wit: the Court of Common Pleas of Dauphin county, the petitioner, the said City of Chester, submitted to the said Court of Common Pleas of Dauphin county certain points wherein the said petitioner specially set up a claim

to certain rights, privileges and immunities under the Constitution of the United States, which points were negatived by the said Court of Common Pleas of Dauphin county, but that the cause was decided in favor of the petitioner on other grounds arising under the Constitution of Pennsylvania, and that, thereupon, the Commonwealth of Pennsylvania took a writ of error to the Supreme Court of Pennsylvania, upon which the said Supreme Court reversed the judgment of the said Court of Common Pleas of Dauphin county, and ordered judgment to be entered in favor of the Commonwealth of Pennsylvania against the petitioner.

And the said Attorney General further causes the Court here to understand and be informed that there is among the papers filed in the case a document purporting to be points submitted to the Court of Common Pleas of Dauphin county, the purport and intention of which document appears to be to set up specially certain rights, privileges and immunities under the Constitution of the United States, which document is printed in the transcript of record, herewith submitted to the Court, pages 14 & 15

That it nowhere appears as alleged, that points were submitted on the trial of the said cause in the trial court; that no record or entry appears upon the docket of the said court or upon the stenographer's record of the trial of the cause, of the submission of the said points, nor are the same noticed in any wise in the findings of fact and conclusions of law or opinion of the trial court, and the said Attorney General herewith submits to this honorable Court the certificate of the judge before whom the case was tried and the affidavit of the prothonotary and deputy prothonotary of the Court of Common Pleas of Dauphin county, showing that the said document, purporting to be points, referred to in the petition upon which the writ of error was granted, was never in fact presented in the trial court.

That upon the petition so as aforesaid presented, the Honorable Joseph P. Bradley, Associate Justice of this Honorable Court, did, on the 11th day of February, 1889, grant the prayer of the petitioner and allow a writ of error from this honorable Court to the Supreme Court of Pennsylvania,

which writ of error, together with the transcript of record of the case, in which was included the document aforesaid purporting to be points, not accompanied by assignments of error, was docketed in this Court to No. 1498, October Term, 1889, on the 31st day of October, 1889; and the said Attorney General for the said Commonwealth, in support of the matters above stated, doth refer to the transcript of the record herewith submitted, and the said petition printed in said transcript on pages 27-32, and to the said affidavits and certificate printed in the appendix to this brief, pages 12 to 15.

And thereupon the said Commonwealth, by her Attorney General, doth move the court here to revoke the allowance of the said writ of error as having been improvidently granted by reason of the untrue statements in said petition contained, and to quash the writ of error issued pursuant thereto.

WILLIAM S. KIRKPATRICK,
Attorney General.

In the Supreme Court of the United States.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

No. 1498, OCTOBER TERM, 1889.

Error to the Supreme Court of Pennsylvania.

MOTIONS TO DISMISS AND AFFIRM.

And now, January 27, 1890, comes the Commonwealth of Pennsylvania, by her Attorney General, William S. Kirkpatrick, and moves the Court here to dismiss this case for want of jurisdiction on the ground that the record herewith produced and shown to the Court fails to show that there was drawn in question in the case the validity of a treaty or statute of, or an authority exercised under, the United States, and a decision against such validity, or that there was drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and a decision in favor of their validity, or that any title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under, the United States, and a decision against the title, right, privilege or immunity specially set up or claimed by either party under such Consti-

tution, treaty, statute, commission or authority, and the said Attorney General further moves the Court here to affirm the judgment in this case on the ground that it is manifest from the record that the writ has been taken for delay, and that if any color of jurisdiction exists, the questions involved were so manifestly decided right and are in themselves so frivolous, that no argument thereof is necessary.

WILLIAM S. KIRKPATRICK,
Attorney Geaeral.

BRIEF ON MOTIONS TO DISMISS AND AFFIRM.

It is the settled doctrine of this Court that to give jurisdiction under section 709 of the Revised Statutes, because of a denial by a State Court of any right, title, privilege or immunity claimed under the Constitution of or any treaty or statute of the United States, it must appear on the record that such title, right privilege or immunity was specially set up or claimed at the proper time and in the proper way. To be reviewable, the decision must be against the right so set up or claimed, and where the Supreme Court of a State reviews the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court is only authorized to review the judgment for errors committed there, and this Court can do no more. This is substantially the language of Chief Justice Waite in *Spies* v. *Illinois*, 123 U. S. 131, 181. The proposition, in substantially the same language, was affirmed in *Brooks* v. *Missouri*, 124 U. S. 394, and in *Chappel* v. *Bradshaw*, 128 U. S. 132.

In this case no matter of law or fact appears of record, by points submitted by the defendant, the city of Chester, in the trial court, or by bills of exception taken there at the instance of said defendant. The case was tried under the act of Assembly of Pennsylvania of 22d April, 1874, printed in the appendix hereto, page 15. The practice under that act is similar to that under a like statute of the United States, as is shown by Brightly's Troubat and Haley's Practice, page 408, where the Federal decisions are quoted in illustration of the practice under the Pennsylvania law.

Said the Supreme Court of Pennsylvania in *Commonwealth* v. *Lehigh Valley Railroad Co.*, 8 Outerbridge, 97:

"This Court, under the ruling of Jamison *v.* Collins, 2 Norris, 359, and Lee *v.* Keys, 7 Norris, 175, can hear and determine only questions of law, arising upon bills of exception to the rulings of the judge, relating to the evidence or to the law of the case. We cannot go behind his findings

of fact except where in a common law trial before a jury the assignment of error is such as can be heard and determined by this Court. The writ of error brings up no question as upon motion for a new trial."

In *Miller* v. *Dunlap*, 21 Weekly Notes Cases, 285, the Supreme Court of Pennsylvania said:

"The act of 14 May, 1874, provides that the duties of a referee in the trial and decision of a cause shall be the same as those of the court under a similar submission. The duties of the court where a trial by jury is waived and the questions of fact and law are submitted to the decision of the court, are regulated by the Act of 22 April, 1874. * * * In this mode of trial the findings of fact stand in the place of a verdict and will not be disturbed except for manifest error. The answers to the points and the conclusions of law stand in lieu of the judge's charge to the jury. The questions of fact and law are thus clearly separated as in trials where the facts are decided by the jury. * * * After a clear statement of the facts found and the legal conclusions reached, an argument in support of any one or more of these is quite in place, but the requirement of the statutes does not extend beyond the separate and distinct statement of the facts found and the rules of law applicable thereto."

The foregoing is a clear definition of what constitutes the record of the trial in the Court below, and it shows that what may be said in the opinion of the Court, independently of the formulated propositions of fact and law, is not strictly a part of the record. One of the conclusions of law is the following:

"2 That said settlement is illegal and invalid because the laws under which it was made and under which the taxes embraced in it are claimed, do not provide for any notice to, or right of appeal by, the owners of the municipal loans who are claimed to be liable for the tax."

This ruling was duly excepted to by the Commonwealth in the trial court, and was embraced in the third specification of error of the Commonwealth in the Supreme Court of Pennsylvania.

It is respectfully submitted, with reference to the foregoing, that, if this is sufficient to show that a Federal question was raised (which is by no means admitted) the Federal question itself does not relate to the rights of the plaintiff

in error (the tax collector), but to those of the bond-holder (the tax payer).

That the parties bear this relation is settled by the construction of this and similar taxing statutes of Pennsylvania.

Maltby v. *Railroad Company*, 2 P. F. Smith, 140.
Commonwealth v. *Lehigh Valley Railroad Company*, 8 Outerbridge 89.
Commonwealth v. *Delaware Division Canal Company*, 8 Crumrine, 595.

In the latter case it was held that the corporation could be heard as to matters relating to the rights of the tax-payer, but as to Federal questions in this Court it is submitted that the title, right, privilege or immunity set up under the Constitution of the United States must be set up by the party for himself, not for a third person.

Owing v. *Norwood's Lessee*, 5 Cranch, 342.
Montgomery v. *Hernandez*, 12 Wheaton. 129.
Henderson v. *Tennessee*, 10 Howard, 311.
Hale v. *Gaines*, 22 Howard 144, 160.
Verden v. *Coleman*, 1 Black, 472
Austin v. *Boston*, 7 Wall. 694.
Long v. *Converse*, 91 U. S. 105.
Miller v. *Lancaster Bank*, 106 U. S. 542.

Of the above cited cases, *Austin* v. *Boston*, 7 Wall. 694, may be taken as an example. The Federal statute provides for the taxation of shares of a national bank where the bank is located, and not elsewhere. The Massachusetts statute in question in that case provided that shares of banks should be taxed at the residence of the shareholder. Austin alleged that this statute was void because it was contrary in its terms and provisions to the Federal statute. It appeared, however, that Austin, who lived in Boston, was taxed upon shares of Boston national banks, and it was held that, as the facts of Austin's case were within the requirements of the Federal statute, he was deprived of no right, and, therefore, had no case.

The motion to affirm is based upon the settled doctrine of the court that a cause ought not to be held for argument

where the Federal question, on which jurisdiction depends, was manifestly decided right.

Transportation Line v. *Cooper*, 99 U. S. 78.
Micas v. *Williams*, 104 U. S. 556.
Swope v. *Leffingwell*, 105 U. S. 3.
New Orlean Ins. Co. v. *Albro Co.*, 112 U. S. 506.
Church v. *Kelseg*, 121 U. S. 282.
Arrowsmith v. *Harmoning*, 118 U. S. 194.
Spies v. *Illinois*, 123 U. S. 131.

The questions sought to be litigated by the plaintiff in error, as shown by the petition for the allocatur, independently of the untrue allegation respecting the points, have been so often pressed upon the attention of the Court, and so often determined adversely, that the rules must be regarded as settled and the questions not entitled to further hearing.

Walston v. *Nevin*, 128 U. S. 578.

That this motion is thus well-founded will appear from a statement of the questions sought to be litigated and the former decisions of this court upon them.

The tax in question is demanded pursuant to the forty-second section of the Act of 29th April, 1844, which is as follows:

That if the county shall pay into the State Treasury its quota of tax levied on its said adjusted valuation, fifteen days prior to the first day of August, in any year, such county shall be entitled to an abatement of five per cent. on the amount so paid; and any State tax remaining unpaid by any individual or corporation after said tax is due and payable by said county to the Commonwealth, shall bear an interest of six per cent., and be a lien on the estate on which it is charged, till fully paid and satisfied. And that it shall be the duty of the treasurer of each county, incorporated city, district and borough of this Commonwealth, on the payment of any dividend or interest, to any holder or agent claiming the same, on any scrip, bond or certificate of indebtedness issued by said incorporated city, district and borough aforesaid, to assess the tax herein made and provided for State purposes, upon the nominal value of each and every sad evidence of debt; said tax to be dednoted by the said treasurer, on the payment of any interest or divi-

dend aforesaid, and the same shall be held by him, until paid over to the State Treasurer; and the said treasurer shall be subject to the same penalties and liabilities now prescribed by existing laws in relation to taxes on bank dividends.

The bonds of the city of Chester were all held by residents of the State of Pennsylvania.

This tax is objected to:

First, Because it is alleged no assessment is provided for.

Second, Because no notice to or hearing of the taxable person is provided for.

Third, Because the tax impairs the corporation's obligation to its creditors.

These objections are thus answered:

1. The Legislature has rightfully fixed the rate as applied to the taxable subject, and no assessment or valuation is required to ascertain the amount of the tax.

In *Savings Bank* v. *United States*. 19 Wallace, 227, 240, it was decided that a suit at law might be maintained for the recovery of the tax on interest paid, even though no list had been returned and no assessment made, and in the opinion it was said:

No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent. on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more, it made the bank a debtor.

This ruling was distinctly affirmed in *King* v. *United States*, 99 U. S. 229, and in *United States* v. *Erie Railway Co.*, 107 U. S. 1. The principle is also recognized in *United States* *Ferrary*, 93 U. S. 65; *National Bank* v. *Commonwealth*, 9 Wall. 353, and other cases.

2. In such case no notice or hearing is required, for none is necessary. The tax is in the nature of a specific tax.

Hagar v. *Reclamation District*, 111 U. S. 701, 709, and cases above cited.

3. There being a legitimate exercise of the taxing power, there is no violation of a contract arising from the deduction of the tax from the obligation by the debtor acting as a collector of the tax.

Haight v. *Railroad Company*, 6 Wall. 15.

United States v. *Railroad Company*, 17 Wall. 322.

The difference between this case and those of *State tax on foreign-held bonds*, 15 Wall. 300. and *Murray* v. *Charleston*, 96 U. S., 432, is as wide as possible. In this case the tax is upon bonds of resident bondholders; in those a tax was sought to be enforced against non-resident bondholders. Here the tax is upon a taxable subject within the taxing jurisdiction of the State. There an arbitrary deduction was attempted from what was not a taxable subject, nor within the jurisdiction of the State.

The State laws furnish a remedy to the bondholder, if any need be sought.

That the remedy exists is shown by *Banger's Appeal*, 13 Out. 79.

That the existence of this equitable remedy answers the objection made, if it be otherwise well founded, is shown by *McMillan* v. *Anderson*, 95 U. S., 37; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Davidson* v. *New Orleans*, 96 U. S., 97.

JOHN F. SANDERSON,
Deputy Attorney General.
WILLIAM S. KIRKPATRICK,
Attorney General.

APPENDIX.

In the Supreme Court of the United States.

No. 1498, OCTOBER TERM, 1889.

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

I do hereby certify that the document purporting to be points submitted to the trial court, to wit: The court of common pleas of Dauphin county, Pennsylvania, and found in the files of Commonwealth *v.* City of Chester, No. 191 March term, 1887, in the said Court of Common Pleas of Dauphin county, was first called to may attention, so far as I have a recollection thereof, within the past week. I have no recollection that such points were submitted on the trial, and I certainly passed on none. I do not mean to be understood as stating positively that said points were not in fact submitted. If they were, I believe they would have been duly noticed and passed upon.

Dated at Harrisburg, January 2, 1890.

J. W. SIMONTON,

President Judge 12th Judicial District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA, } *ss:*
COUNTY OF DAUPHIN, }

I, W. H. Ulrich, prothonotary of the Court of Common Pleas in and for the said county, do hereby certify that the Honorable J. W. Simonton, by whom the foregoing certificate was made and who has thereunto subscribed his name, was at the time of making thereof and still is president judge of the Court of Common Pleas, Orphans' Court and Court of Quarter Sessions of the Peace in and for said county, duly commissioned and qualified, to all whose acts

as such full faith and credit are and ought to be given as well as in courts of judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 3d day of January, A. D. 1890.

[SEAL.] W. H. ULRICH,
Prothonotary.

STATE OF PENNSYLVANIA, } ss:
DAUPHIN COUNTY, }

W. H. Ulrich, being duly sworn according to law, deposes and says: I am now and was during the year 1887 and up to the present time prothonotary of the Court of Common Pleas of Dauphin county. I was present in court during the trial of the case of Commonwealth of Pennsylvania *v.* City of Chester, to 191 March term, 1887. I have no recollection that any points were submitted on behalf of the defendant on the trial of said case, and I believe that if any were submitted they would have been duly marked filed. I have examined the original paper purporting to be points of charge submitted to the court. The same is not marked or endorsed in any way as a file of the court in my handwriting, or in that of any of my deputies or clerks. That the record of said case was made up for the Supreme Court of Pennsylvania by attaching the original papers on file in the case to the writ of error and returning them therewith. That deponent examined the record as thus made up, and he is confident that said paper purporting to be points of charge was not in the files or attached to the writ of error at that time. That to the best of deponent's knowledge and belief he never saw said paper purporting to be points of charge until within the past few days.

W. H. ULRICH.

Sworn and subscribed before me this 2d day of January, A. D. 1890.

[SEAL.] HARVEY B. HOUCK,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
DAUPHIN COUNTY, }

I, W. H. Ulrich, prothonotary of the Court of Common Pleas of Dauphin county, do hereby certify, that Harvey B. Houck, Esq., was at the time the annexed and foregoing affidavit was made, an acting notary public in said county and State, duly commissioned and qualified, and authorized by law to administer oaths, take acknowledgments of deeds, etc., and that the signature hereto affixed, purporting to be his, is genuine.

Witness my hand and the seal of said court, at Harrisburg, this 3d day of January, A. D. 1890.

[SEAL.] W. H. ULRICH,
Prothonotary.

STATE OF PENNSYLVANIA, } ss:
DAUPHIN COUNTY, }

John P. Melick, being duly sworn according to law, deposed and said:

I am now and was, during the year 1887, and up to the present time, Deputy Prothonotary of the Court of Common Pleas of Dauphin county. I was not present in court during the trial of the case of Commonwealth *v.* City of Chester, No. 191, March term, 1887, of said court. I have charge of the dockets of the said Court, and it is my duty to make, and I do make, the docket entries in cases pending in said court. I have no recollection of receiving or filing any paper purporting to be points of charge submitted to the court in the above entitled case. I have examined a paper in the files of the said case, to No. 191 March term, 1887, purporting to be points of charge submitted to the court on the trial of the said case. The said paper is not endorsed or marked filed in my handwriting, or in that of any clerk or officer connected with the Prothonotary's office of the said court, nor was the said paper ever entered upon the appearance docket of the said court as having been filed in the case. When the record of the said case was made up for the Supreme Court of Pennsylvania, by attaching the orig-

nal papers on file in the case to the writ of error and returning them therewith, I compared the docket entries of papers filed with the original papers on file, and at that time I have no recollection of discovering the document purporting to be points of charge above referred to, nor have I any recollection of having attached the said document to the said writ of error at that time, and in fact I have no recollection of ever having seen the paper referred to, purporting to be points of charge, until within the past week or ten days when my attention was called thereto. I believe that if any such paper were in the files at the time when the record was made up for the Supreme Court of Pennsylvania, I would have noticed and remembered it.

JOHN P. MELICK.

Sworn and subscribed to before this third day of January, A. D. 1890.

[SEAL.] FREDERICK M. OTT,
Notary Public.

STATE OF PENNSYLVANIA, DAUPHIN COUNTY, } *ss:*

I, W. H. Ulrich, Prothonotary of the Court of Common Pleas of Dauphin county, do hereby certify that Frederick M. Ott, Esq., was at the time the annexed and foregoing affidavit was made, an acting notary public in said county and State, duly commissioned and qualified, and authorized by law to administer oaths, take acknowledgements of deeds, etc, and that the signature hereto affixed, purporting to be his, is genuine. Witness my hand and the seal of said court, at Harrisburg, this 3d day of January, A. D. 1890.

[SEAL.] W. H. ULRICH,
Prothonotary.

AN ACT

To provide for the submission of civil cases to the decision of the court and to dispense with trial by jury.

SECTION 1. *Be it enacted, &c*, That in any civil case now pending in any of the courts of this Commonwealth, or hereafter to be commenced, after issue joined, the parties thereto, excepting those acting in a fiduciary capacity, may, by agreement filed in the proper office where such suit is

pending, dispense with trial by jury, and submit the decision of such cases to the court having jurisdiction thereof; and such court shall hear and determine the same, and the judgment shall be subject to writ of error or of appeal as in other cases at law or in equity, at the option of either party.

SECTION 2. The decision of the court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper court where the case is pending, as early as practicable, not exceeding sixty days after such decision shall have been made from the termination of the trial, and notice thereof shall be forthwith given by the prothonotary or clerk to the parties or their attorneys, and if no exceptions thereto are filed in the proper office within thirty days after service of such notice judgment shall be entered thereon by the prothonotary or clerk; if exceptions to the findings of facts or conclusions of law be filed within said thirty days, the court or the judge thereof who tried the case in vacation, may, upon argument, order judgment to be entered according to the decision previously filed, or make such modifications thereof as in justice and right shall seem proper, subject always, nevertheless, to review by writ of error or appeal in the Supreme Court; such writ of error or appeal to be taken in the time and manner and with the effect prescribed by law.

SECTION 3. Every such case taken to the Supreme Court upon writ of error shall be heard and determined therein as writs of error are therein heard and determined; and every such case taken to the Supreme Court by appeal shall be heard and determined therein as cases of appeal in equity proceedings; and in case a new trial is ordered it shall be proceeded with before the same court in the same manner as hereinbefore provided for.

SECTION 4. An agreement to submit under this act shall be a waiver of the right of trial by jury.

SECTION 5. Cases submitted under the provisions of this act shall be subject to existing law as to costs, except no jury fee shall be required on entering judgment.

Approved the 22d day of April, A. D. 1874. (P. L. 109.)

Extracts from Act of March 30, 1811.

[Brightley's Purdon's Digest, Title, Public Accounts.]

Section 1. All accounts between the Commonwealth and any person or persons, body politic or corporate, as well those with the officers of the revenue, as other persons intrusted with the receipt, or who have or hereafter may become possessed of public money, also the accounts of all persons having claims on the Commonwealth, except as hereinafter excepted, shall be examined and adjusted by the Auditor General according to law and equity.

Section 3. When any public account is examined and adjusted, entered in the books of the office, and signed by the Auditor General, it shall be submitted, together with the vouchers and all other papers and information appurtenant thereto, to the State Treasurer, for his revision and approbation; and in order that the State Treasurer may be enabled to revise and examine the accounts so submitted to him, he is hereby invested with powers similar to those vested in the Auditor General by this act.

Section 11. If any person or persons, body politic or corporate, be dissatisfied with the settlement of his, her or their account by the Auditor General and State Treasurer, he, she or they may appeal therefrom to the Court of Common Pleas of the county in which the seat of government shall then be, and such appeal shall be transmitted by the Auditor General to the clerk of the said court, to be by him entered on record, subject to like proceedings, under the directions of the State Treasurer, as in common suits: *Provided, however*, That the appeal be filed in the office of the Auditor General within sixty days after notice of such settlement, and be accompanied with a specification of objections to the said settlement; and that the person or party appealing shall enter sufficient security before one of the judges of the Court of Common Pleas, within ten days next after such appeal, to prosecute such appeal with effect, and to pay all costs and charges which the Court or arbitrators shall award, and also pay any sum of money which shall appear, by the judgment of the said Court or award of arbitrators, to be due by him, her or them to the Commonwealth: *Provided, nevertheless*, That where any proceedings shall be had against any person or persons, who, upon summons and demand made, in pursuance of this act, shall have refused or neglected to exhibit his, her or their account to the Auditor General, as by this act is directed, such person or persons shall not be allowed any appeal from the settlement of the accountant officers, but the same shall be final.